2010

Tim Risinger d/b/a Marathon Traids Carpet Mill Outlet v. Midtown Joint Venture, LC, et al. : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

TIM RISINGER d/b/a MARATHON TRIADS CARPET MILL OUTLET, Plaintiffs, MIDTOWN JOINT VENTURE, LC, ET AL., Defendants. AND CONSOLIDATED ACTIONS.	**DOCKET NO. 20100533** Fourth District Court Consolidated Case No. 080401531

BRIEF OF APPELLEES

APPEAL FROM AN INTERLOCUTORY ORDER OF THE HONORABLE JUDGE SAMUEL D. McVEY, ENTERED JUNE 22, 2010

Robert F. Babcock (USB No. 0158)
Kent B. Scott (USB No. 2897)
Cody W. Wilson (USB No. 9839)
BABCOCK SCOTT & BABCOCK, PC
Washington Federal Plaza
505 East 200 South, Suite 300
Salt Lake City, Utah 84102
Telephone (801) 531-7000
Facsimile (801) 531-7060

Attorneys for Appellees Big-D Construction Corp., Big-D Construction Corp./Ellsworth Paulsen Construction Co.-JV, Ellsworth Paulsen Construction, Tim Risinger d/b/a Marathon Triads Carpet Mill

Ronald G. Russell (USB No. 4134)
Stephen E.W. Hale (USB No. 5285)
Matthew J. Ball (USB No. 9414)
Jenifer L. Tomchak (USB No. 10127)
PARR BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Attorneys for Appellant United Western Bank

ORAL ARGUMENT REQUESTED

Outlet, Ken Harris Architect, BMC West Corporation, TS Electric, Inc., Geneva Rock Products, Inc., Aspen View Construction, LLC, Valley View Building Services, Inc., Carey W. Olsen dba Finishing Touches Painting, Spectrum Engineers, Inc., Wasatch Ornamental Iron, and RP Painting & Decorating

Darwin H. Bingham
Christopher C. Hill
SCALLEY READING BATES HANSEN & RASMUSSEN
15 W. South Temple, Suite 600
Salt Lake City, Utah 84101
Attorneys for Appellee Quality Assurance Engineering, Inc. d/b/a Consolidated Engineering Laboratories

Mark L. Poulsen
NELSON SNUFFER DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Attorneys for Appellees Western States Mechanical, Inc., JPM, Inc., Houghton Plaster, Inc. and M.C. Green & Sons, Inc.

Michael J. Kelly
Mark D. Tolman
JONES WALDO HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Appellee Sierra Pacific Industries, Inc.

IN THE UTAH COURT OF APPEALS

TIM RISINGER d/b/a MARATHON TRIADS CARPET MILL OUTLET, Plaintiffs, MIDTOWN JOINT VENTURE, LC, ET AL., Defendants. AND CONSOLIDATED ACTIONS.	**DOCKET NO. 20100533** Fourth District Court Consolidated Case No. 080401531

BRIEF OF APPELLEES

APPEAL FROM AN INTERLOCUTORY ORDER OF THE HONORABLE JUDGE SAMUEL D. McVEY, ENTERED JUNE 22, 2010

Robert F. Babcock (USB No. 0158)
Kent B. Scott (USB No. 2897)
Cody W. Wilson (USB No. 9839)
BABCOCK SCOTT & BABCOCK, PC
Washington Federal Plaza
505 East 200 South, Suite 300
Salt Lake City, Utah 84102
Telephone (801) 531-7000
Facsimile (801) 531-7060

Attorneys for Appellees Big-D Construction Corp., Big-D Construction Corp./Ellsworth Paulsen Construction Co.-JV, Ellsworth Paulsen Construction, Tim Risinger d/b/a Marathon Triads Carpet Mill

Ronald G. Russell (USB No. 4134)
Stephen E.W. Hale (USB No. 5285)
Matthew J. Ball (USB No. 9414)
Jenifer L. Tomchak (USB No. 10127)
PARR BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Attorneys for Appellant United Western Bank

ORAL ARGUMENT REQUESTED

Outlet, Ken Harris Architect, BMC West Corporation, TS Electric, Inc., Geneva Rock Products, Inc., Aspen View Construction, LLC, Valley View Building Services, Inc., Carey W. Olsen dba Finishing Touches Painting, Spectrum Engineers, Inc., Wasatch Ornamental Iron, and RP Painting & Decorating

Darwin H. Bingham
Christopher C. Hill
SCALLEY READING BATES HANSEN & RASMUSSEN
15 W. South Temple, Suite 600
Salt Lake City, Utah 84101
Attorneys for Appellee Quality Assurance Engineering, Inc. d/b/a Consolidated Engineering Laboratories

Mark L. Poulsen
NELSON SNUFFER DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Attorneys for Appellees Western States Mechanical, Inc., JPM, Inc., Houghton Plaster, Inc. and M.C. Green & Sons, Inc.

Michael J. Kelly
Mark D. Tolman
JONES WALDO HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Appellee Sierra Pacific Industries, Inc.

David R. Nielson
Conrad H. Johansen
Kevin M. Bischoff
OLSEN SKOUBYE & NIELSON, LLC
999 East Murray-Holladay Road,
Suite 200
Salt Lake City, Utah 84117
Attorneys for Appellees B&B Specialties, LLC, Robert I. Merrill Company, and Owell Precast, LLC

Mark E. Wilkey
SME STEEL CONTRACTORS, INC.
5801 West Wells Park Road
West Jordan, Utah 84081
Attorneys for Appellee SME Steel Contractors, Inc.

Paul J. Walstad
Stephen O. Taylor
WALSTAD LAW GROUP
Wells Fargo Center
86 North University Ave., Suite 400
Provo, Utah 84601
Attorneys for Appellee Clayco, Inc.

Darrel J. Bostwick
Joseph D. McAllister
BOSTWICK & PRICE, PC
175 South Main, 16th Floor
Salt Lake City, Utah 84111
Attorneys for Appellee Firetrol Protection Systems, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4a-103(2)(j).

STANDARD OF REVIEW

The appellant must show material findings that are clearly erroneous by marshaling all evidence supporting the findings, then showing this evidence is legally insufficient to support the findings when viewed in a light most favorable to the trial court's findings. *See Gilmor v. Family Link, LLC*, 2010 UT App 2 ¶ 19, 224 P.3d 741 (stating clearly erroneous standard of review); *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177 (stating marshaling requirement).

A District Court's decision to admit evidence is reviewed for abuse of discretion. *See Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 10, 94 P.3d 193 (citation omitted).

The appellant must show legal error by the trial court in its use of fixed principles and rules of law, demonstrating the trial court incorrectly selected, interpreted, or applied the law. *See State v. Pena*, 869 P2d 932, 936 (Utah 1994).

A challenge to a grant of summary judgment presents a question of law, which appellate courts review for correctness, and in doing so, appellate courts view the facts and all reasonable inferences drawn therefrom in the light most

favorable to the nonmoving party. *Sohm v. Dixie Eye Center*, 166 P.3d 614 (Utah App. 2007).

DETERMINATIVE STATUTORY PROVISION

Utah Code Ann. § 38-1-5. Priority – Over other encumbrances.

The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground; also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground. (1953)

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is an interlocutory appeal of an order in which the District Court determined that the Claimants mechanics' liens had priority superior to the trust deeds of Defendant/Appellant (collectively the "Bank") pursuant to Utah Code Ann. § 38-1-5 (1953). The Midtown Village Project is a phased mixed-use development providing commercial, retail and residential spaces on State Street in Orem, Utah. The Midtown Village Project ("Property" or "Project") was developed by Larry J. Myler ("Developer") with the intent to fund the construction of the Property initially from (1) his own resources, (2) construction loans from various sources, (3) bond funds received from the City of Orem, and (4) other financing. The foregoing

financial resources were to be supplemented by cash flow generated from the sale of residential condominiums, retail spaces and commercial leases obtained before and during construction.

The Midtown Project was to consist of an Icon office building surrounded by a Main Building consisting of three wings or towers collectively served by a central utility plant. The towers in the Main Building were to have retail spaces on level one, office space on level two and residential condominiums in levels three through seven.[1]

In the fall of 2004, Marshall Investment Corp. ("Marshall"), after arranging an initial unsecured loan of $562,000 to commence construction on the Project, went about structuring and securing a syndicate of lenders to fund a loan for the construction of the Project. After receiving some but not enough participant lenders, Marshall determined that the transaction was not strong enough for syndication without additional financial strength on the part of the borrower. Marshall asked the Developer to obtain another stronger guarantor. To that end Jerry C. Moyes was identified and contacted to support the financing of the Project with his personal guaranty. Thereafter, Marshall continued with its marketing the Project to potential lenders. On June 16, 2005, Marshall finalized its loan for the Project (which it had actively marketed since the fall of 2004) and funded the

---

[1] *See* a copy of the architectural rendering of the Project and a photograph of the model created by the Developer of the Project attached hereto as *First Addendum to Brief*, [R. 5337-5507, Exhibit "D"].

construction loan. At the time the loan closed, several contractors who had deferred payment or gone unpaid for work or services previously performed on the project until financing could be formalized, received payments from the loan.

The Plaintiff/Appellees mechanics' liens (collectively the "Claimants") are architects and contractors who provided materials and construction services in the improvement of the Property. The Claimants did not get paid for those improvements and as a result, filed and foreclosed their liens now hold against the Property. Ellsworth Paulsen began as the general contractor. At the request of Marshall, Ellsworth Paulsen added a partner, Bud Bailey Construction ("BBC"), to the construction team. After the loan closed, Big-D Construction Corp. ("Big-D") replaced BBC in a joint venture with Ellsworth Paulsen ("EP/BIG-D JV"). EP/Big-D JV served as the general contractor for the construction of the project and subcontracted with a majority of the other contractors. A few of the Claimants, such as the architect, contracted directly with the Property owner.

Appellant United Western Bank is the successor to the Federal Deposit Insurance Corporation, which was the successor to BankFirst and Marshall. In January 2005, BankFirst was acquired by Marshall which later changed the holding company name to Marshall BankFirst Corp. and then later simply to BankFirst. All of Marshall BankFirst Corp. entities, including the Marshall Group, Inc., Marshall Investments Corp., Marshall BankFirst Corp., and BankFirst, are

referred to collectively as "BankFirst." It was Marshall Investments Corporation and BankFirst that provided financing for the construction of Midtown Village Project. United Western Bank, Marshall and BankFirst are referred to collectively herein as the "Bank".

The District Court found that Claimants' mechanic's lien claims had priority over the construction trust deed filed by the Bank. The District Court based its order on the absence of any disputed material facts, the plain reading of Utah Code Ann. § 38-1-5 and the judicial determination of "commencement" from Utah's highest courts dating back decades – holding that mechanics' liens relate back to and attach as of the date of commencement of first work on an improvement and shall have priority over any lien, mortgage or encumbrance attached subsequently in time.

II. COURSE OF PROCEEDINGS BELOW.

Following the suspension of construction work on the Project in February 2008, the contractors who provided construction services and material ("Claimants"), recorded mechanic's lien notices in the office of the Utah County Recorder. Starting May 16, 2008, the Claimants began filing lien foreclosure actions, which were subsequently consolidated with the first-filed action.

On April 9, 2009, EP/Big-D JV and several other Claimants filed a Motion for Partial Summary Judgment.[2] This motion was later joined by the other Claimants.[3] By their Motion for Partial Summary Judgment, the Claimants sought a determination that visible commencement of work on the ground took place prior to June 15, 2005, the date of the recording of the first trust deed by BankFirst. The Claimants also sought a determination that pursuant to Utah Code § 38-1-5, the Claimants' mechanics' liens related back to and attached as of the date of commencement of first work on the ground and therefore with the legal effect of giving the Claimant's priority over the subsequently filed Bank trust deed.

Following the filing of the Motion (April 9, 2009), the parties stipulated to proceed with discovery necessary for the Bank to respond to the Motion for Partial Summary Judgment. Thereafter, the Bank filed its memorandum in opposition to the Motion for Partial Summary Judgment on July 31, 2009.[4] On September 9, 2009, Claimants filed a reply memorandum in support of their Motion for Partial Summary Judgment.[5]

Following the completion of briefing, the District Court heard oral argument on April 23, 2010. At the close of the argument the District Court orally announced its decision to grant the motion. The District Court determined that, because it was

---

[2] *See* Motion for Partial Summary Judgment [R. 1360-1665].
[3] *See* various notices of joinder [R. 2115-19, 2220-29, 2440-46, 3221-25, 4208-16, 4609-16].
[4] *See* Opposition Memorandum [R. 4976-5059].
[5] *See* Reply Memorandum [R.5337-5507; 5507 A].

undisputed that substantial excavation occurred on the Midtown Village site starting in late 2004, "as a matter of law the commencement of work did occur in the fall 2004 timeframe."[6] The District Court went on to conclude that all of the work performed on Midtown Village was part of a single project, with a common plan that was not materially abandoned.[7] Finally, the District Court stated that it was "disregarding the facts the Bank moved to strike with the exception" of "considering title insurance only for the purpose of showing notice, having nothing to do with negligence and never having looked at any policies or commitments."[8]

On June 22, 2010, the District Court entered a Corrected Order granting Claimants motion for partial summary judgment and an Order denying Bank's Motion to Strike.[9]

The Bank sought permission to file an interlocutory appeal on July 7, 2010.[10] The Utah Supreme Court granted the Bank's petition and transferred the appeal to the Utah Court of Appeals on August 6, 2010.[11]

---

[6] *See* Corrected Order [R.7848-7857] attached hereto as *Second Addendum to the Brief*; Transcript, at p. 64 [R.8538].
[7] *See Id.*
[8] *See* Corrected Order [R.7848-78-57]; *Id.*, pp. 64-70 [R.8538] attached hereto as *Second Addendum to the Brief.*
[9] *See* Corrected Order [R.7848-57] attached hereto as *Second Addendum to the Brief*; Order [R.7845-47] attached hereto as *Third Addendum to the Brief.*
[10] *See* Petition for Permission to Appeal [R.7999-8000].
[11] *See* Order [R.8344] attached hereto as *Third Addendum to the Brief.*

STATEMENT OF FACTS

The term "undisputed material facts" is pivotal to this case. In this case there are no disputed material facts, only a dispute between the legal application of those undisputed material facts that are material to the application of Utah Code § 38-1-5 in establishing Claimant's priority interest. The Bank, in its Brief, has not set out the material facts that are needed in order to resolve the issues brought by this appeal. Many of the facts are cited out of context. Others are mixed with inaccurate statements of law. Still other statements of fact are inaccurate and are not supported by the record. For these reasons, Claimants dispute the Bank's entire Statement of Facts and in its place provide the Court with its own statement which Claimants believe to be accurate and supported by the record of this case.

I. Statement of Facts as to the Excavation.

1. The Developer obtained a loan commitment letter from Marshall and paid a $15,000 good faith deposit in August 2004. Shortly thereafter the Developer received an unsecured loan for $562,000 from Marshall. The Developer then directed Claimants to proceed with certain required excavations for the Main Building. The Developer commenced excavation on the Project for, among other reasons, to complete excavations before winter and to show the City of Orem, buyers of pre-sold condos and others that the Project was a reality.[12]

---

[12] The $562,000 loan was paid off from the BankFirst loan proceeds in June 2005; Deposition Exhibit 190; *Jim Krumm Depo.*, 102 [R. 5507 A, Exhibit "3"];

2. More than $800,000 worth of excavation work for the south wing of the building was performed in late 2004 which work created a massive hole with dimensions of approximately 400' in length, 150' in width and 22' in depth. This massive excavation was the first construction work to be performed in connection with the Project. The excavation on the ground was a necessary component that would enable all other construction to take place. The purpose of this massive excavated hole was for the mat footing and underground parking structure for the south wing/tower of the Main Building. A second substantial hole for the north wing was also excavated in late 2004 and early 2005.[13] The construction on the ground also made it possible to continue with the other necessary components of construction work that were eventually performed.

3. The excavation work was visible to anyone that visited the Project site before the loan closed. Those who visited the Project site and witnessed the massive excavation included notably a representative of Marshall and the representative of the Equity Title handling the loan closing. The representative of

---

Deposition Exhibits 14,153,181,182; *Larry Myler Depo.*, 26:22 to 27:17; 29:1-7; 150:15-24 [R.5507 A, Exhibit "4"]; *Jim Krumm Depo.*, 36:23-25 to 37:18; 65:1-9 [R.5507 A, Exhibit "3"]; *Brett Harris Depo.*, 120:7 to 121:10 [R.5507 A, Exhibit "2"].

[13] Deposition Exhibit 190; *Jim Krumm* Depo., 102 [R.5507 A, Exhibit "3"]; *Larry Myler Depo.*, 31:17-23; 32:6-12 (hole is 12 foot deep); 41:8 to 43:18; 43:9-18; 61:6-25; 114:5-13; 202:14-18 [R.5507 A, Exhibit "4"]; Deposition Exhibit 96; *Brett Harris Depo.*, 110:14 to 111:7; 111:16-24; 112:24 to 113:2; 115; 116:7-11 [R.5507 A, Exhibit "2"]; *Gary Reynolds Depo.*, 60:17-20; 65:16-24; 138:18 to 141:3 [R.5507 A, Exhibit "6"].

Equity Title performed a site investigation and then completed the Mechanics Lien Risk Analysis form for the Title Company.[14]

4. The BankFirst trust deed for the $42 million loan was recorded on June 17, 2005.[15] From the first proceeds of this loan, costs were paid the Claimants in excess of $800,000 for the excavation, shoring and supervision work they performed on the Project in late 2004 and early 2005, prior to the recordation of the trust deed.[16]

5. The payment of the $800,000+ for the construction excavation work occurred after recordation of the trust deed. It is undisputed that the $42 million BankFirst construction loan, was intended for and used for the building of the Project, including further and extensive work on the premises by Lien Claimants.[17] The $800,000 construction excavation work was included in the schedule of value used by the Bank as part of the loan documents.[18]

---

[14] Deposition Exhibits 96,165; *Jim Krumm Depo.*, 96:2 to 99:11 [R.5507 A, Exhibit "3"]; *Larry Myler Depo.*, 31:17-23; 32:6-12; 43:9-18; 61:6-25; 114:5-13; 202:14-18 [R.5507 A, Exhibit "4"]; *Adella Pearson Depo.*, 50:21-25; 58:25 to 59:9; 61:5-20; 58:25 to 61:21 [R.5507 A, Exhibit "5"].

[15] Deposition Exhibit 161; *Larry Myler Depo.*, 63 [R.5507 A, Exhibit "4"].

[16] "Admitted" - Admission 17 in BankFirst response to the Request for Admissions by Big-D, *et. al.*, dated June 16, 2009 said admission being made after a recitation of general objections to the request; Deposition Exhibit 190; *Jim Krumm Depo.*, 102 [R.5507 A, Exhibit "3"].

[17] *Larry Myler Depo.*, 139:5-8 [R.5507 A, Exhibit "4"].

[18] Deposition Exhibit 190; *Jim Krumm Depo.*, 102 [R.5507 A, Exhibit "3"].

II. Statement of Facts that the Project was Not Materially Abandoned.

1. There was no material change in the owner. Mr. Larry Myler was the developer of The Midtown Village Project and was the contact person for each of the entities involved in developing the Project including Western Oasis, Tower Development Services, Midtown LLC, and ultimately the Midtown Village Joint Venture, a successor to the interests of the other entities.[19]

2. There was no change in the lender. Marshall and BankFirst was the lender that worked with the Developer from July of 2004 until BankFirst funded the loan in June of 2005.[20]

3. Marshall did not materially abandon its efforts to provide the construction loan. In fact, not only did the Bank (Marshall) not abandon its efforts but the Bank (Marshall) (1) provided the Developer with a loan commitment letter for the Project in August 2004;[21] (2) required from the Developer a $15,000 good faith deposit for the Project loan in August of 2004;[22] (3) arranged for a loan advance to the developer of $562,000 in unsecured funds to permit the Developer to

---

[19] *See* Exhibits "B" & "C" of the Reply Brief in Support of Motion for Partial Summary Judgment [R.5337-5507]; *Larry Myler Depo.*, 116:25 to 118:3; 136:2-6; 152:15 to 154:12; 155:10-13 [R.5507 A, Exhibit "4"].

[20] Deposition Exhibits 181,155, 184,186,187,189, 193; *Jim Krumm Depo.*, 34:21 to 35:11; 44:24 to 45:9; 46:3-21; 56:24 to 57:5; 70:14 to 71:6; 77:11-22; 78:6 to 79:10; 86:8-15; 86:5-10 [R.5507 A, Exhibit "3"].

[21] Deposition Exhibit 181; *Jim Krumm Depo.*, 27 [R.5507 A, Exhibit "3"].

[22] Deposition Exhibit 183; *Jim Krumm Depo.*, 39:10-23) [R.5507 A, Exhibit "3"].

commence excavating for the Project in September 2004;[23] (4) developed and created its marketing package in September 2004 and began acquiring subscriptions from participant banks in October 2004;[24] (5) persisted in its efforts to finance the Project until it succeeded in having the loan closed in June of 2005;[25] (6) acquired subscriptions from participant banks in October and November of 2004;[26] (7) required and approved a stronger guarantor for the Developer to improve the marketing package in December of 2004;[27] (8) maintained existing participant banks while it continued working on the financing for the Project, (9) issued an updated solicitation package in the spring of 2005 and (10) acquired subscriptions from additional participant banks in 2005 (1 in January; 8 in March; 7 in April; 4 in May; and 8 in June).[28]

4. At all material times the Project architect was Ken Harris Architects and the General Contractor was Ellsworth Paulsen Construction or a joint venture

---

[23] Deposition Exhibits 153,182; *Jim Krumm Depo.*, 36:23 to 37:18; 65:1-9 [R.5507 A, Exhibit "3"]; *Larry Myler Depo.*, 26:22 to 27:17 [R.5507 A, Exhibit "4"].
[24] Deposition Exhibits 184,185,186,187; *Jim Krumm Depo.*, 42,45,48,51 [R.5507 A, Exhibit "3"].
[25] Deposition Exhibits187,188; *Jim Krumm Depo.*, 51, 54 [R.5507 A, Exhibit "3"].
[26] Deposition Exhibits 184,185,186,187; *Jim Krumm Depo.*, 42,45,48,51 [R.5507 A, Exhibit "3"].
[27] Deposition Exhibit 188, Email dated Dec. 18, 2004; *Jim Krumm Depo.*, 54 [R.5507 A, Exhibit "3"].
[28] Deposition Exhibits 185,186,187,188; *Jim Krumm Depo.*, 45,48,51,54 [R.5507 A, Exhibit "3"].

including Ellsworth Paulsen Construction.[29]

5. At all relevant times, the Project was not materially changed. The Project has always been a mixed use project with a Main Building situated in a "U" shape consisting of South, North and West wings with a central courtyard surrounding an Icon Tower.[30] The Project was to have underground parking with approximately 98,000 square feet of retail on the first floors; 106,000 square feet of office space on the second floors; and 243 residential condominiums on the third through seventh floors. More than 50% of the 243 residential condos had been pre-sold and more than 50% of the retail space had been pre-leased, before and while, the Bank was marketing the financing package to participant banks.[31]

SUMMARY OF ARGUMENT

In its appeal brief, the Bank is specifically asking this Court to change Utah's current legal standard that excavation qualifies as commencement of work. Appellants are asking this Court to change the rule of established law and standard and create a new standard that commencement of work occurs when

---

[29] Deposition Exhibits 4,18,19,155, 181,193; *Allen Washburn Depo.*, 48,91,94 [R.5507 A, Exhibit "7"]; *Larry Myler Depo.*, 35; 89:25 to 90:19; 90:20-24 [R.5507 A, Exhibit "4"]; *Jim Krumm Depo.*, 27,120 [R.5507 A, Exhibit "3"].

[30] *See* Project site plan attached hereto as *Fourth Addendum to the Brief* [R.5337-5507, Exhibit "D"].

[31] Deposition Exhibits 115; *Brett Harris Depo.*, 227 [R.5507 A, Exhibit "2"]; Deposition Exhibits 181,189,193; *Jim Krumm Depo.*, 27, 91,120 [R.5507 A, Exhibit "3"].

concrete for the footings or foundation is poured. The facts are not in dispute; only the legal standard by which the term "commencement of work" is defined is at issue. The District Court correctly ruled that the material facts in this case were undisputed and that pursuant to Utah Code § 38-1-5 the Claimants' mechanics' liens related back to and attached as of the date of commencement of first work (excavation work) and therefore have priority over the subsequently filed trust deed of the Bank. The District Court was correct in its application of the correct legal standard when it defined "commencement of work" to include the Claimants' substantial excavation work.

The central critical issue of what constitutes the first "visible construction work" is placed before this Court. There are no disputed factual issues concerning the massive 400' wide, 150' long, and 22' deep excavation for the mat footing and underground parking for the south tower of the Main Building for the Project. The Bank labels that massive excavation as "mere site preparation work." However, this massive excavation went far beyond what courts have held as "mere site preparation work."

Any project construction must begin in the ground, with excavations for the footings and for underground facilities, such as basements and parking structures. Such excavation work was part of every contract in this case, and was designated on the schedule of values accompanying the general

contractors' contracts. There is no disputed fact that the Bank, and its title company handling the loan closing, were fully aware that excavation for the Project had commenced months before the Bank recorded its deed of trust on June 15, 2005. In fact, Jim Krumm ("Krumm"), the vice-president of Marshall/BankFirst and the originator of the loan with the developer, visited the Project while working on the loan package in the spring of 2005 (a few months before the loan closed) and personally observed the large excavated hole on the Project. Additionally, Adella Pearson ("Pearson"), Vice-President at Equity Title Insurance Agency, Inc. ("Equity Title") who handled the loan closing, personally inspected the premises and observed the large excavation prior to June 15, 2005. In fact, at the request of First American Title Company (the "Title Company"), Pearson completed a Mechanics Lien Risk Analysis in which she informed the Title Company that "excavation had begun."

The Bank attempts to create disputed facts to explain that the Project was "materially abandoned." In this attempt, the Bank is wholly unsuccessful. In fact, nothing in the exhibits and testimony of this case demonstrates any material abandonment of the Project. The Developer (and the companies he utilized to develop the Project) testified he never abandoned the project. Equally compelling is that the Bank, the defendant raising the material abandonment defense, did not abandon its own efforts to provide the $42 million construction

loan. In fact, not only did the Bank not abandon its efforts but the Bank provided loan commitment letters, received good faith deposits, facilitated the advance of unsecured funds to commence excavating, marketed the loan package, acquired participant banks in 2004, persisted in its efforts to finance the Project with a revised loan package until it succeeded in having the loan closed, approved a stronger guarantor to improve the marketing package, maintained existing participant banks and acquired subscriptions from additional twenty-eight participant banks in 2005.[32]

The Bank never materially abandoned its efforts to finance the Project and eventually, together with the participating banks, approved the Project financing. Simply put, it strains all reason for the Bank to argue before this Court there was a "material abandonment" of the Project. The Bank cannot point to any testimony of any witness or any document that states that the project was abandoned. The testimony of all of the witnesses demonstrated that they did not abandon the Project.

Finally, the District Court did not abuse its discretion and considered nothing that was irrelevant or inadmissible when it considered the existence of title insurance solely for the purpose of showing actual notice to the title company that excavation had commenced.

---

[32] A list of the participant banks with the dates they subscribed is attached hereto as *Fifth Addendum to the Brief* [R.5337-5507, Appendix "A"].

ARGUMENT

The District Court correctly ruled that the material facts in this case are undisputed. Further, the District Court applied the correct legal standards when it ruled that pursuant to Utah Code Ann. § 38-1-5 the Claimants' mechanics' liens relate back to and attached as of the date of commencement of first work. Finally, the District Court properly concluded that the mechanic's liens therefore have priority over the subsequently filed trust deeds of the Bank.

Despite the Bank's protestations to the contrary, there are no disputed material facts. Previously the Bank attempted to disguise legal argument as "disputed fact", selectively citing deposition testimony; and selectively presenting undisputed facts out of sequence and context to appear as disputed. Despite those attempts, the District Court correctly ruled that the Claimants have priority over the Bank's trust deed. At present, the Bank is once again attempting the same approach by disguising legal argument as "disputed facts." It is the intent of the Claimants to demonstrate that despite the Bank's protestations to the contrary there are still no disputed material facts and the District Court ruled correctly.

Contrary to the Banks argument, this Project was a single project with a common plan prosecuted with reasonable promptness. There was no material change in the owner of the Project. There was no change in the architect of the Project. There was no material change in the general contractor of the Project.

There was no change in the lender to the Project. In summary, there was no material change in the Project.

Finally no one – not even the Bank itself – abandoned the Project.

Accordingly, this Court should affirm the order of the District Court granting Claimants a priority interest in the property to which their mechanic's lien claims attach.

I. THE BANK'S ATTEMPT TO CHANGE UTAH'S ESTABLISHED LEGAL PRECEDENT GOVERNING EXCAVATION AS COMMENCEMENT OF WORK SHOULD BE REJECTED.

Under the doctrine of stare decisis, "[t]hose asking us to overturn prior precedent have a substantial burden of persuasion."[33] The Utah Supreme Court has stated that "we will not overturn precedent unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."[34]

Utah's statutory law provides a mechanics' lien for contractors such as Claimant's that perform construction services in the improvement of land.[35] The established legal precedent regarding the priority of a mechanics' lien with respect to other encumbrances, such as a deed of trust, is governed by § 38-1-5 of the Utah Code which provides in pertinent part:

---

[33] *Laney v. Fairview City*, 57 P.3d 1007, 1021 (Utah 2002).
[34] *Id.*, at 1021.
[35] *See* Utah Code § 38-1-3.

> [Mechanics' liens] shall relate back to, and take effect as of, the *time of the commencement to do work* or furnish materials *on the ground* for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground.

To determine the priority date of a mechanics' lien against another encumbrance, the Court must look to the "commencement to do work" test.[36] An examination of the cases decided in Utah reveals that "actual excavation for the foundation" of a building is commencement of work for the purpose of determining priority of mechanic's liens.[37]

---

[36] *See* Utah Code § 38-1-5.

[37] *E.W. Allen & Associates, Inc. v. Federal Deposit Ins. Corp.*, 776 F. Supp. 1504 (Utah 1991); *EDSA/Cloward, LLC v. Klibanoff,* 122 P.3d 646 (Utah Ct. App. 2005); *Calder Bros. Co. v. Anderson,* 652 P.2d 922, 923 n. 1 (Utah 1982) ("Generally, the presence of building materials upon the land or other visible evidence of work performed provides notice to any interested party that work has commenced."); *Western Mortgage Loan Corp. v. Cottonwood Constr.,* 18 Utah 2d 409, 424 P.2d 437, 439 (1967) ("The presence of materials on the building site or evidence on the ground that work has commenced on a structure or preparatory thereto is notice to all the world that liens may have attached."); *First of Denver Mortgage Investors v. C.N. Zundel,* 600 P.2d 521 (Utah 1979); *Ketchum Konkel v. Heritage Mountain Dev. Co.,* 784 P.2d 1217, 1224 (Utah Ct. App.1989); *Davis-Wellcome Mortgage Co. v. Long-Bell Lumber Co.,* 184 Kan. 202, 336 P.2d 463, 466 (1959); This common statutory and case law approach is consistent with the majority of jurisdictions in the United States. *See Bruner & O'Connor on Construction Law*, 8:129; 8:146; 8:147; 1 A.L.R. 3d 822 § 6 ("It has been recognized in the following cases applying lien statutes providing in effect that the lien accrues at the time the work on the building commences, that at least the digging of the cellar or the excavating for the foundation amounts to the commencement of the building, and the mechanics' liens accrue at that time...").

In its appeal brief, the Bank specifically asks this Court to change Utah's long standing precedent defining excavation as the commencement of work on a construction project. The Bank is asking this Court to establish a new standard whereby the commencement of work would not be the actual excavation for the building's foundation. The Bank has asked the Court to establish a new standard by which the commencement of work would occur further into the project; i.e., when the actual concrete is poured for the footings and foundations within that excavation. The Bank seeks to do this even in view of the fact that its own loan documents and payment records provide for the payment of excavation work as part of the loan closing and construction process.[38]

Under the doctrine of stare decisis, the Bank has failed to meet the substantial burden of persuasion that is necessary for this shift in Utah's established legal precedent defining excavation as the commencement of work on a construction project.

II. THE BANK ATTEMPT TO CHANGE UTAH'S ESTABLISHED LEGAL PRECEDENT GOVERNING MATERIAL ABANDONMENT SHOULD BE REJECTED.

Again, under the doctrine of stare decisis, "[t]hose asking us to overturn prior precedent have a substantial burden of persuasion."[39] The Utah Supreme Court has stated that "we will not overturn precedent unless clearly convinced

---

[38] Deposition Exhibits 19, 21; *Allen Washburn Depo.*, 94 [R.5507 A, Exhibit "7"]; Deposition Exhibit 190; *Jim Krumm Depo.*, 102 [R.5507 A, Exhibit "3"].
[39] *Laney v. Fairview City*, 57 P.3d 1007, 1021 (Utah 2002).

that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."[40]

Utah's case law provides that it can be a "complex" evaluation to determine whether or not a construction project has been "materially abandoned" because of the need to review all of the facts relating to the question of why a project may have been abandoned or temporarily halted.[41]

In its appeal brief, the Bank specifically asks this Court to change Utah's current established standard of defining whether or not a construction project has been materially abandoned. The Bank asks this Court to establish a new standard that the intent to abandon or continue work be determined from strictly visible site conditions, not from any review of the many activities away from the project site.

Utah's established legal precedent of determining whether or not a construction project has been materially abandoned comes from a complete review of the activities relating to the project including an inquiry into intention. Utah courts review the totality of circumstances and project activities both on and

---

[40] *Id.*, at 1021.

[41] *Ketchum Konkel v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 1225 (Utah Ct. App.1989); *citing Frank J. Klein & Sons, Inc. v. Laudeman*, 270 Md. 152, 311 A.2d 780 (1973); *Brettschneider & Wellman*, 230 Minn. 225, 41 N.W. 2d 255 (1950).

off the project site in determining whether or not there has been material abandonment.[42]

To support its request for this shift in legal precedence, the Bank cites to a case from Minnesota – *Langford Tool & Drill Co. v. Phenix Biocomposites* – a case which has not been cited or followed in any Utah decision dealing with the definition of material abandonment. The Bank would have the Utah courts adopt what the *Langford* court refers to (but never adopts) as the "Kansas Rule" rather than the "Oregon rule" or some combination of the two rules. The line of authority cited by the Bank, in addition to being over a century old, is inapplicable since Utah does not follow the so-called "Kansas Rule."

Utah's legal precedent is in fact much different than the "Kansas Rule" discussed in the *Langford* case. Utah's courts have looked not only at the activities on the project site but also at all activities dealing with a construction project to determine if a "material abandonment" has occurred. In fact, in the Utah cases which have opined on the subject of abandonment, the Courts have looked at and cited to cases which examined facts relating to such off site activities as efforts to obtain construction financing, efforts to obtain a bond, efforts to obtain state approval for the project, sales of the property, change in contractors, comparison of plans for the project, and all other consistent,

---

[42] *Ketchum Konkel v. Heritage Mountain Dev. Co.,* 784 P.2d 1217, 1225 (Utah Ct. App.1989).

continuous and diligent activities to proceed to completion in determining if a project was materially abandoned.[43]

This Court in *Ketchum* cited *Klien* that "in order to determine whether a material abandonment has occurred, **an inquiry into intention must be**

---

[43] *Ketchum Konkel v. Heritage Mountain Dev. Co.,* 784 P.2d 1217, 1225 (Utah Ct. App.1989) (*citing Frank J. Klein & Sons, Inc. v. Laudeman*, 270 Md. 152, 311 A.2d 780 (1973) (The *Klein* court found that, although there was a significant cessation of work, it was due to reasons not unheard of in construction – loss of financing, failure to get a bond, state approval, and project went ahead with little change in the original plans; the issue more correctly stated is whether there has been sufficient cessation of work to constitute the end of construction on one project and the initiation of work on another project); *Brettschneider & Wellman*, 230 Minn. 225, 41 N.W. 2d 255 (1950) (the fact that a building may be temporarily halted does not necessarily mean than abandonment has occurred; many things might cause a building project to be temporarily halted, but if there is no abandonment or severance of the contract it may still be entire and continuous in nature within the contemplation of the statute); In the *Nu-Trend Electric, Inc. v. Deseret Federal Savings & Loan Assoc., Inc.*, 786 P.2d 1369 (Utah Ct. App. 1990) (the Court recited as facts many offsite activities such as transfers of property, sales of property, change in contractor, comparison of plans in subjectively reviewing material abandonment); *Eastern & Western Lumber Co. v. Williams*, 129 Or. 1, 276 P. 257, 259 (Facts which will constitute an abandonment must include a conclusion, upon the part of the participants, to cease operations permanently, or at least for an indefinite period. Thus a mere cessation of labor is not an abandonment. The setting of the sun generally causes a cessation of labor for the night; unfavorable weather conditions may halt construction for a longer period; similar interruptions may come from labor troubles or the lack of materials. In each of these instances, no one has concluded to abandon the project. Similarly, the lack of money caused a cessation of work, but was unaccompanied with a conclusion to abandon the project.); *Stark-Davis Co. v. Fellows et al.*, 129 Or. 281, 277 P. 110, 112 (In order to constitute a permanent abandonment of the construction of the building,..., there should be a cessation of operation, and an intent on the part of the owner and contractor to cease operations permanently, or at least for an indefinite period, or some fair notice to or knowledge of the abandonment by a lien claimant, either actual or implied).

made."[44] This intent is not a secretive intent, but is to be an objective manifestation of intent as cited by this Court in *Ketchum.*[45] This Court further stated that this is a "complex inquiry"[46] because it looks at all project activities instead of the oversimplified approach favored by the Bank of a simple site observation. Utah courts have reviewed the totality of circumstances and project activities both on and off the project site in determining whether or not there has been material abandonment.

In determining material abandonment Utah courts have looked at the manifest intent of the parties. The manifested intent whether or not to abandon a project is not a secretive intent but is evaluated by considering all of the activities that are occurring both on and off the project site.

It confounds all reason for the Bank to argue that this Project was materially abandoned with the Bank admittedly never abandoned its efforts to provide financing for the Project. While it took the Bank several months longer to obtain all of the subscriptions to the loan package to fund the total loan amount, the Bank did successfully complete the loan financing. The Bank is not a new innocent lender which came into the Project midstream – it was there throughout all relevant times. The principal cause of the temporary halt to on site work on

---

[44] *Ketchum Konkel v. Heritage Mountain Dev. Co.,* 784 P.2d 1217, 1226 (Utah Ct. App.1989).
[45] *Id.*
[46] *Id.*

the Project was the delay in the Bank providing the financing. As stated, the Bank was the party working with the Developer the entire time to get financing for the Project. While the Bank and Developer were working on finalizing the financing, the other parties to the Project including the architect, the general contractor, many subcontractors, Orem City, the real estate agents continued working on the Project.

Under the doctrine of stare decisis, the Bank has failed to meet its substantial burden of persuasion that is necessary for this shift in Utah's established legal precedent of determining whether or not a construction project has been materially abandoned from a complete review of the activities relating to the project including an inquiry into intention to a new standard that material abandonment is determined from the results of only a simple site visit without any inquiry into intention.

III. SUBSTANTIAL VISIBLE WORK UNDISPUTEDLY COMMENCED ON THE PROPERTY PRIOR TO THE TRUST DEED'S RECORDING ON JUNE 17, 2005.

In its Order, the District Court held that the mechanic's liens of the Claimants had priority over the Bank's trust deed because it concluded that visible construction work on the Midtown Village Project ("Project") commenced prior to the recording of the Bank's trust deed. The Court also held that the undisputed facts supported the conclusion that the Project was not materially

abandoned from the time the excavation work commenced in the fall of 2004 to the time the $42 million loan closed and the trust deed was recorded in June 2005 as required by Utah Code § 38-1-5.[47]

The District Court based its conclusion on the undisputed facts that (1) excavation work was performed at the Property beginning in September 2004 through early 2005; (2) the dimension of the excavation work performed in late 2004 was approximately 400' in length, 150' in width and 22' in width; (3) the excavated hole was for the footings and underground parking structure for the south wing of the Project; (4) a second hole for the north wing of the Project was also excavated in late 2004 and early 2005; (5) some of the soil slopes of the excavation were stabilized with gunite and soil nails; (6) the excavation work was readily visible to anyone that visited the Project site; (7) the excavation for the mat foundation and footings and the underground parking became part of the overall work of improvement for the Project; (8) the Bank's construction deed of trust to secure its loan in the amount of $42 million was recorded on June 17, 2005; (9) before the loan closed both a representative of the Bank and a representative of Equity Title Company, who was handling the loan closing, actually observed the excavation work identified above; and (10) prior to the loan closing, on June 17, 2005, the representative of Equity Title Company completed

---

[47] *See Corrected Order*, at p. 2-3 [R.7850] attached hereto as *Second Addendum to the Brief*.

a form entitled "*Mechanics Lien Risk Analysis*" indicating that in her opinion, based upon her inspection of the site, excavation work on the improvement had commenced and that lien claimants existed.[48]

By its Order, the District Court further held that the excavation and stabilization of the gigantic foundation pit was not "mere site preparation" but was instead "visible construction work" constituting a "commencement of work" as required for priority purposes under Utah Code § 38-1-5.

Accordingly, each of these determinations by the District Court is correct and should be affirmed.

IV. VISIBLE CONSTRUCTION IS COMMENCEMENT TO DO WORK FOR PRIORITY PURPOSES OF MECHANICS LIENS UNDER UTAH CODE § 38-1-5.

A. Utah's Mechanic's Lien Statute is to be Broadly Construed in Favor of Lien Claimants.

As this Court and the Utah Supreme Court have repeatedly explained, the requirement that there be "commencement to do work" is construed broadly and in favor of lien claimants.[49] In accordance with this broad reading of the mechanic's lien statutes, the excavation and stabilization of the massive

---

[48] *See Corrected Order*, at p. 2-4 [R.7850] attached hereto as *Second Addendum to the Brief*.

[49] *See, e.g. Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982); *Ketchum v. Heritage Mountain Development Co.*, 784 P.2d 1217, 1220 (Utah Ct. App. 1989); *Tripp v. Vaughn*, 747 P.2d 1051, 1055 (Utah Ct. App. 1987); *See Corrected Order*, at p. 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*.

foundation pit in the fall of 2004 and early 2005 was clearly visible construction work constituting the "commencement of work" as required for priority purposes under Utah Code § 38-1-5.

The effect of filing a mechanics' lien pursuant to the terms of Utah Code Ann. § 38-1-1 *et al.* is that it gives constructive notice to the world that the lien claimant has maintained a secured claim against the property which has been improved by the lien claimant's work and materials. According to Utah Code § 38-1-5, the contractor's lien claim takes effect when the first visible construction work gives a reasonable person notice that the value of the land is being enhanced as the result of the construction of buildings, structures and/or improvements furnished by contractors and design professionals.

Utah courts have held that "[t]he presence of building materials upon the land or other visible evidence of work performed provides notice to any interested party that work has commenced."[50] The unique aspect of a mechanics' lien is that commencement of visible work is treated as imparting constructive notice of a potential mechanics' lien claim.[51] Under Utah law, there exists a general test of

---

[50] *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982).

[51] *See First of Denver Mortgage Investors v. C.N. Zundel & Assoc's.*, 600 P.2d 521 (Utah 1979); *see also Richards v. Security Pac. Nat'l Bank*, 849 P.2d 606, 612 (Utah Ct. App.), *cert. denied*, 859 P.2d 585 (Utah 1993) (commencement of visible construction work is treated as imparting constructive notice of mechanics' lien).

commencement for purposes of determining the priority date of a mechanics lien vis-a-vis a construction lender.[52]

In *Calder Bros. v. Anderson,* the Utah Supreme Court held that "visible evidence of work provides evidence to any interested party of commencement."[53] The Federal District Court for Utah in *E.W. Allen & Associates v. FDIC* held that "the work must be in the form of an improvement that is visible to the extent that a reasonable person using reasonable diligence would be able to see that work was underway."[54] In *Ketchum v. Heritage Mountain*, the Utah Court of Appeals held that Utah case law emphasizes visible work performed on the property or the presence of materials, giving notice that work has commenced on the property.[55]

B. The District Court Based its Ruling of Priority on Undisputed Facts and Established Legal Precedent Governing Utah Mechanic's Lien Law.

Throughout its Brief the Bank claims the District Court impermissibly weighed evidence. There were, however, absolutely no material facts in dispute.

---

[52] *E.W. Allen & Associates, Inc. v. Federal Deposit Ins. Corp.*, 776 F. Supp. 1504 (1991).
[53] *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982) ("Evidence on the ground that work has commenced on a structure or preparatory thereto is notice to all the world that liens may have attached."); *See Western Mortgage v. Cottonwood Construction Company,* 424 P.2d 437, 439 (Utah 1967).
[54] *E.W. Allen & Associates v. FDIC,* 776 F. Supp. 1504, 1509 (1991).
[55] *Ketchum Konkel, Barret, Nickel & Austin v. Heritage Mountain Dev. Co.,* 784 P.2d 1217, 1220 (Utah App. 1989).

There are several key undisputed facts which summarize the Bank's involvement in the commencement of work on the Project in the fall of 2004:

1. It is the undisputed testimony of the Developer, that he (a) obtained a loan commitment letter from the Bank; (b) gave the Bank a $15,000 good faith deposit in August 2004; (c) received an unsecured loan for $562,000 from the Bank (Marshall Bank, an affiliate of BankFirst); and (d) directed contractors to proceed with the required excavation for the Project, for among other reasons, to complete excavation before winter and to show the City of Orem, buyers of pre-sold condos and others that the Project was a reality.[56]

2. The $800,000 worth of excavation work performed in late 2004 created a massive pit with dimensions of approximately 400' in length, 150' in width and 22' in depth; this massive excavated hole was for the mat footing and underground parking structure for the south wing of the Main Building; a second substantial hole for the north wing was also excavated in late 2004 and early 2005.[57]

3. The excavation work was visible to anyone that visited the Project site before the loan closed including notably a representative of the Bank and the representative of the Equity Title handling the

---

[56] *See Corrected Order*, at p. 5-6, 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; the $562,000 loan was paid off from the BankFirst loan proceeds in June 2005. Deposition Exhibit 190; *Jim Krumm Depo.*,102 [R.5507 A, Exhibit "3"]; Deposition Exhibits 14,153,181,182; *Larry Myler Depo.*, 26:22-27 to 27:17; 29:1-7; 150:15-24 [R.5507 A, Exhibit "4"]; *Jim Krumm Depo.*, 36:23-25 to 37:18; 65:1-9 [R.5507 A, Exhibit "3"]; *Brett Harris Depo.*, 120:7 to 121:10 [R.5507 A, Exhibit "2"].

[57] *See Corrected Order*, at p. 5-6, 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; Deposition Exhibit 190, *Jim Krumm Depo.*,102 [R.5507 A, Exhibit "3"]; *Larry Myler Depo.*, 43:9-18; 61:6-25; 114:5-13; 31:17-23; 32:6-12 (hole is 12 foot deep); 202:14-18 [R.5507 A, Exhibit "4"]; Deposition Exhibit 96; *Brett Harris Depo.*,115 [R.5507 A, Exhibit "2"]; *Gary Reynolds Depo.*, 60:17-20; 65:16-24; 138:18 to 141:3 [R.5507 A, Exhibit "6"]; *Larry Myler Depo.*, 41:8 to 43:18 [R.5507 A, Exhibit "4"]; *Brett Harris Depo.*, 110:14 to 111:7; 111: 6-24; 112:24 to 113:2; 116:7-11 [R.5507 A, Exhibit "2"].

loan closing who completed the Mechanics Lien Risk Analysis form for the Title Company.[58]

4. The Bank trust deed for the $42 million loan was recorded on June 17, 2005. From the first proceeds of this loan, costs in excess of $800,000 for the massive excavation, shoring and supervision work performed on the Project in late 2004 and early 2005 were paid.[59] As part of the loan closing and payment a release was obtained for the mechanics lien filed by Wadsworth for the amounts owed for the guniting and soil nailing work to stabilize some of the excavated slopes.

5. The funding occurring after recordation of the trust deed to secure the $42 million the Bank construction loan, was intended for, and was used for the building of the Project, including further and extensive work on the premises by the contractors.[60]

Construction work was commenced on the Project by excavator Reynolds Brothers Construction ("Reynolds") on September 24, 2004. There is no dispute that Reynolds billed the Developer $657,397.59 for excavation work performed in late 2004 and early 2005.[61] In addition, Wadsworth Construction billed

---

[58] *See Corrected Order*, at p. 5-6, 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; Deposition Exhibits 96,165; *Jim Krumm Depo.*, P.96:2 to 99:11 [R.5507 A, Exhibit "3"]; *Larry Myler, Depo.*, 43:9-18; 61:6-25; 114:5-13; 31:17-23; 32:6-12; 202:14-18 [R.5507 A, Exhibit "4"]; *Adella Pearson Depo.*, 50:21-25; 59:25 to 60:9; 61:5-20; 58:25 to 61:21 [R.5507 A, Exhibit "5"].

[59] *See Corrected Order*, at p. 5-6, 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; Deposition Exhibit 161; *Larry Myler Depo.*, 63 [R.5507 A, Exhibit "4"]; "Admitted" - Admission 17 in BankFirst response to the Request for Admissions by Big-D, *et. al.*, dated June 16, 2009 said admission being made after a recitation of general objections to the request [R. 4670]; Deposition Exhibit 190; *Jim Krumm Depo.*, P.102 [R.5507 A, Exhibit "3"].

[60] *See Corrected Order*, at p. 5-6, 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; *Larry Myler Depo.*, 139:5-8 [R.5507 A, Exhibit "4"].

[61] Deposition Exhibit 16, p.11; *Allen Washburn Depo.*, 79 [R.5507 A, Exhibit "7"]; Deposition Exhibit 81; *Gary Reynolds Depo.*, 100 [R.5507 A, Exhibit "6"].

$157,079.31 for its shoring work performed to stabilize the side slopes of portions of the massive foundation pit.[62] There is also no dispute that the foregoing amounts for the commenced excavations were paid at the closing by the Bank from the initial funding of the $42 million loan.[63]

Despite these undisputed facts, the Bank petitions this Court to reject decades of Utah jurisprudence determining what constitutes commencement of work under Utah Code § 38-1-5. The Bank is asking this Court to now hold that commencement to do work only takes place when the concrete footings or foundation are constructed.[64] The Bank does not point to any other courts in the country that have held that excavation work is insufficient work and that the pouring of actual concrete is the appropriate standard for commencement of visible work. Further, the Bank also fails to cite to any case in the country which holds that the Project's massive excavation for a mat footing for the building structures and for the underground parking constitutes "mere site preparation work."[65] Instead the Bank improperly and erroneously characterizes and labels

---

[62] Deposition Exhibit 147; *Tod Wadsworth Depo.*, 87:25-88:20.
[63] Deposition Exhibit 190, P. 3; *Jim Krumm Depo.*, 102 [R.5507 A, Exhibit "3"].
[64] The Bank wants this court to conclude that no matter the volume of earth removed during excavation it does not amount to "commencement of work."
[65] *Bruner & O'Connor on Construction Law*, 8:129; 8:146; 8:147; 1 A.L.R. 3d 822 § 6 ("It has been recognized in the following cases applying lien statutes providing in effect that the lien accrues at the time the work on the building commences, that at least the digging of the cellar or the excavating for the foundation amounts to the commencement of the building, and the mechanics' liens accrue at that time...").

the massive excavated pit as "mere site preparation work."[66] No witness or expert testified that such substantial excavation and guniting work was "mere site preparation work."

C. The Excavation Work Performed for the Mat Footing and Underground Parking is Not Mere "Site Preparation Work" but Constitutes Commencement of Visible Work.

The Bank claims in its brief that the District Court impermissibly weighed evidence regarding this issue. However, there were absolutely no material facts in dispute. The only dispute is the label that should be given to the excavation work. The only way the Bank can get to that argument is by specifically asking this Court to change Utah's current legal standard that excavation counts as commencement of work to a new standard that commencement does not occur until concrete is poured. Ultimately, the label given by the Bank to the excavation work is a legal conclusion not a factual matter.

The Bank misrepresents the holding of *E.W. Allen & Associates v. FDIC* in asserting that the excavation in 2004 at the Project was merely "site preparation

---

[66] The Bank attempts to confuse the Court by implying all excavation is the same. Not so. Clearing and grubbing excavation work, done to provide a level site to commence work, does not give notice. Excavation below grade, for basements, underground parking, for footings and foundations, provides notice that work has commenced. One-million plus of excavation for the underground parking and mat slab and soil nailing and guniting to stabilize the sides of the gigantic excavation is not "preconstruction work" or "mere site preparation" as contended by the Bank.

work"[67] and did not constitute "commencement to do work." For example, the Bank correctly notes that surface excavation referred to in that case did not provide notice to the public, but conspicuously omits the statement of that opinion that the digging of a basement does signal the start of work. That Court also specifically stated that "excavation for the foundation of a building is commencement."[68]

Utah law is clear as to what type of work does and does not constitute "commencement to do work." In *First of Denver Mortg. Investors v. CN Zundel*, the court held that off-site excavation for a subdivision when such excavation is

---

[67] The Bank attempts to raise a fact issue by giving bald conclusive "labels" to the nature of the work in place in the fall of 2004, such as calling a $800,000 dollars worth of excavating and shoring "mere site preparation work." Site preparation work by definition consists of clearing and grubbing and possibly simple surface grading of the property, all of which leaves the property in a flat condition which would not put a reasonable person inspecting the property on notice that construction has commenced. The Claimants who performed the construction work and gave value to the Project for which they have not been paid urge the Court to look through allegations which the Bank calls "fact issues", but are really nothing more than arguments of counsel. When the Court focuses on what the witnesses are undisputedly saying, i.e. that a 400 foot hole was present six months before the trust deed was recorded, it is clear that while the Bank has raised a legal position, it has failed to raise any genuine or disputed facts.

[68] *See Corrected Order*, at p. 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; *E.W. Allen*, 776 F. Supp. at 1509-10; The Bank attempts to confuse the Court by implying all excavation is the same. Not so. Clearing and grubbing excavation work, done to provide a level site to commence work, does not give notice of commencement of construction. Excavation below grade, for basements, underground parking, for footings and foundations, provides notice that work has commenced. $800,000 plus of excavation for the underground parking and mat slab and soil nailing and guniting to stabilize the sides of the gigantic excavation is not "preconstruction work" or "mere site preparation" as contended by the Bank.

of a substantial nature constituted the start of work.[69] *E.W. Allen* cites a number of examples of actions that do not qualify as "commencement to do work" including stock piling top soil, leveling and grading. But excavating for a basement or foundation does qualify as "commencement to do work."

In the instant case, the gigantic 22' deep, 400' long and 170' wide excavated pit, which served as the excavation for both a footing and the structure for underground parking, goes far beyond what other cases (both inside and outside of Utah) have held to constitute the first visible construction work.

In a recent Utah Court of Appeals case cited by the Bank, which is clearly distinguishable from the instant case, the Court again references the previously-held principle that staking, surveying, and clearing land was preparatory work that did not suggest the existence of some impending or ongoing construction project.[70] The work performed in *EDSA* (i.e., staking, surveying, conducting studies, and installing minor irrigation parts for some overall improvements not actually part of the project itself) is light years away from what occurred in the instant case.

Reynolds Brothers did not merely scrape away some top soil and leave a backhoe on site to give the impression that work had begun. Reynolds and

---

[69] *In First of Denver Mortg. Investors v. CN Zundel*, 600 P.2d 521,526 (Utah 1979).

[70] *See Corrected Order*, at p. 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; *EDSA/Cloward, LLC v. Klibanoff,* 192 P.3d 296, 300-301 (UT App. 2008).

Wadsworth engaged in excavation a pit of 400'x200'x22' deep, guniting, and soil-nailing work the value of which alone was over $800,000. This was work that the Bank gave an unsecured loan to commence and later fully paid for when the loan closed on June 15, 2005. This was the work that the Bank's title company referred to in the Lien Risk Analysis acknowledging the commencement of construction.[71] The Bank's own inspector referred to the excavation work in its first inspection report dated August 18, 2005, stating that "Information provided by the Marshall Group (*aka* BankFirst) in August 2005 indicated that project work either completed or in progress includes excavation for parking garages, in addition to soft cost work including land acquisition, permits, etc."[72] The Bank inspector's characterization that the excavation was for the "parking garages" was based on the information provided by the Bank itself.[73]

The Bank erroneously relies on *Diversified Mortgage Investors v. Gepada*[74] and *United Lumber v. Minmar Investment*[75] for the proposition that the excavation is not the commencement of work for purposes of the relation back doctrine. In fact, those cases hold the exact opposite for what the Bank cites them, by clearly signaling that substantial excavation work in the nature of

---

[71] Deposition Exhibit, 165; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].
[72] *See* Exhibit "A" to Reply Brief in Support of Motion for Summary Judgment [R.5337-5507].
[73] *Id.*, p.1 [R.5337-5507].
[74] *Diversified Mortgage Investors v. Gepada*, 401 F. Supp. 682, 685 (S.D. Iowa 1975).
[75] *United Lumber v. Minmar Investment*, 472 S.W. 2d 630 (Mo. App. 1971).

footings and basements represents the start of work for purposes of lien priority. The vast majority of law from other states is substantially similar to the law in Utah and dictates that the type of work performed by Reynolds qualifies as "commencement to do work" and is not merely "site preparation."[76]

The Bank contends without reference to any authority that there is a requirement that actual pouring of concrete for a footing or foundation must[77] occur before lenders are on notice that work has commenced. This contention is

---

[76] *See, e.g. Drilling Service Co. Baebler*, 484 S.W. 2d 1 Mo. App. 1972)(Horizontal underground work is the same as vertical structural work for purposes of the relation back doctrine, such that site excavation work consisting of roads, sewer, and utilities - which were permanent - signaled the start of work); *Williams Lumber Co. v. Poarch*, 428 S.W.2d 308 (Tenn. 1968)(Work on footings constituted commencement of work); *Woolridge Const. Co., v. First National Bank*, 634 P.2d 13 (Ariz. 1981) (Construction of the building site pad gave priority over later recorded trust deed); *Robinson v. Thatcher*, 451 P.2d 863, 864 (Or. 1969)(Excavation of a basement is lienable start of work); *Vasquez v. Village Center, Inc.* 362 S.W. 2d 588 (Mo. 1962)(Site work, such as building pads and compaction for footings give priority over a trust deed); *Brettschneider v. Wellman*, 41 N.W. 2d 255 (Minn. 1955)(Excavation of basement is commencement of work); *Seracuse Lawler & Partner v. Copper Mountain*, 654 P.2d 1328, 1331 (Col. App. 1982)(Excavation of underground parking is the start of work under the relation back doctrine).

[77] For example, the Bank states that "visible work commenced on the Project in October 2005, when pouring of the footings and parking structure foundation began... ." This statement represents nothing more than a legal conclusion, not a disputed issue of fact. "Evidence on the ground that work has commenced ... is notice to all the world that liens may have attached; See *Western Mortgage v. Cottonwood Construction Company,* 424 P.2d 437, 439 (Utah 1967). It simply stretches credulity to say that a person standing on State Street in Orem in the fall of 2004, would not view a concrete-coated football-field size hole as construction that had commenced.

contradicted by long standing Utah jurisprudence.[78] There is no bright line requirement of pouring the concrete for the footings or foundations from the excavation for the footing or foundation as is suggested by the Bank.[79] In fact, the Bank specifically asks this Court to change Utah's current legal standard that excavation counts as commencement of work to a new standard that commencement occurs when concrete is poured. This the Bank is urging this Court to do even in view of the Bank's acknowledgment in the construction loan documents and in its payment records that the excavation work was part of the construction process.[80]

Out of dozens of lien priority cases throughout the country, the Claimants have been unable to find a single case where the excavation for a mat footing or of a basement, or of an underground structure, such as a parking garage, was not held to provide notice to the world that work had commenced. The Bank's

---

[78] For example, *First of Denver Mortg. Investors v. CN Zundel*, 600 P.2d 521 (Utah 1979), which held that site excavation work did constitute the start of work.
[79] *See generally E.W. Allen*, 766 F. Supp 1504; the absurdity of the Bank's position can be seen in what is being argued. The Bank contends that if the *pouring* of the footing in the bottom of the massive 25' x 400' x 150' excavated hole, would have taken place in the fall of 2004 or early 2005, then "first visible work" would have occurred and the Bank would more appropriately be on notice. Again, there is no dispute regarding the facts of the excavation. The dispute relates solely to the legal conclusion to be drawn from those undisputed facts. The legal conclusion is that the excavation of the gigantic holes for the footings and underground parking structures is the commencement of the work and trumps the later pouring of concrete within that gigantic excavation.
[80] Deposition Exhibits 19, 21; *Allen Washburn Depo.*, 94 [R.5507 A, Exhibit "7"]; Deposition Exhibit 190; *Jim Krumm Depo.*, 102 [R.5507 A, Exhibit "3"].

attempt to equate "clearing and grubbing" with the excavation of a gunite and soil nailed jumbo basement is disingenuous at best.[81]

V. The Excavation and Shoring Work Performed in 2004 Provided Clear Notice that Work had Commenced on the Project.[82]

A. The Excavation Work and Shoring Work Furnished Actual and Constructive Notice Work had Commenced on the Project.

In applying Utah law, the U.S. District Court for Utah held that "the work must be in the form of an improvement that is visible to the extent that a reasonable person using reasonable diligence would be able to see that work was underway."[83]

It is correct that a notice of commencement provided by visible evidence of work at the site constitutes constructive notice that improvements to the land are being made that may be subject to a mechanic's lien claim. Compared to constructive notice, actual notice is a higher standard. However, what the Bank neglects to state in its brief is the fact that in this case actual notice is undisputed and constructive notice is apparent to any reasonable observer. In fact, the Bank

---

[81] The Bank is asking this Court to conclude that no matter the volume of earth removed during excavation it does not amount to "commencement of work."

[82] In order to not permit the interjection of a fact issue into this summary judgment, the lien claimants conceded for purposes of the motion that the work on the Icon Tower, while clearly the nerve center of the entire project, did not represent the commencement of work on the Main Building.

[83] *See Corrected Order*, at p. 8-9 [R.7850] attached hereto as *Second Addendum to the Brief*; *E.W. Allen & Associates v. FDIC,* 776 F. Supp. 1504, 1509 (1991); *See also Calder Bros., supra.; Western Mortgage v. Cottonwood Construction Company, supra.*; *Ketchum v. Heritage, supra.; Tripp v. Vaughn, supra.*

– the lender in question – had actual knowledge that the excavation work had commenced because they loaned the money for that very purpose. A part of the funds loaned by the Bank were used to pay for the excavation work. The Bank's also acknowledged the excavation work in the schedule of work values that are included in the loan documents.[84] The Bank's title company, Equity Title, provided a Mechanic's Lien Risk Analysis which documented that "excavation had begun" prior to the loan closing.[85] The Bank's actual knowledge is recognized in the deposition testimony of the Developer:

> Q. Did there come a time when they [Marshall] loaned you some money for the project, about $560,000?
>
> A. Yes.
>
> Q. What was the purpose of that loan?
>
> A. There was some smaller amounts that were paid to architects, engineers, and one larger amount that was paid for excavation of the site.
>
> Q. I think you indicated that you had discussions with them about wanting to get the excavation going to beat winter?
>
> A. Yes.
>
> Q. In fact, is that what you then proceeded to do?
>
> A. Yes.

---

[84] Deposition Exhibits 19, 21; *Allen Washburn Depo.*, 94 [R.5507 A, Exhibit "7"]; Deposition Exhibit 190; *Jim Krumm Depo.*, 102 [R.5507 A, Exhibit "3"].
[85] Deposition Exhibit 165; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].

Q. In the fall – in September of 2004, you didn't have financing in place for the project. Why did you decide to go ahead with excavation work at that time?

A. We were trying to beat the weather. I raised that question with Marshall. They said they felt confident enough about the project that they would front the money for excavation and other costs, and so they did.[86]

In fact, the Bank had actual knowledge that work had commenced since it helped facilitate an unsecured loan to the Developer.[87] Jim Krumm, the BankFirst senior vice president, testified in his deposition that he knew that the excavation work would proceed prior to the time the construction loan would be finalized. He testified as follows:

Q. When we were discussing this need that Myler had for financing in the September of 2004 time frame, did Myler indicate to you that he wanted to get things moving on the project?

A. Yes.

Q. But he lacked money to get it moving?

A. Yes.

Q. Did he indicate as part of that that he wanted to get some excavation work going to get the project moving?

A. Yes.

Q. After he got the loan, did he indicate to you that in fact he was going to proceed with that excavation work?

---

[86] *Larry Myler Depo.*, 26:22-27 to 27:17; 29:1-7; 150:15-24 [R.5507 A, Exhibit "4"].

[87] *Jim Krumm Depo.*, 36:23-25; 37:1-18; 99:3-11 [R.5507 A, Exhibit "3"]

A. I don't recall that conversation.

Q. Do you recall the conversation that he wanted to get it to get excavation going?

A. Yes.

Q. Did you understand during this time frame that we've been talking about that Larry had proceeded with doing excavation work on the site?

A. After he received the loan?

Q. Yes.

A. Yes.

Q. And that was in the middle of September, roughly, of '04?

A. Yes.

Q. But you saw the excavation?

A. When I drove up, yes.

Q. It was pretty evident to you that the excavation had occurred?

A. Yes.

Q. That didn't surprise you because you were aware that Larry [Myler] was going to start with the excavation work.

A. No, it did not surprise me.[88]

Indeed, everyone who was questioned about the Project site prior to the loan closing testified they saw the gigantic excavated pit. The Bank has provided no evidence that the excavation was not visible to one making a site inspection.

---

[88] *Jim Krumm Depo.*, 36:23-25 to 37:18; 65:1-9; 99:3-11[R.5507 A, Exhibit "3"].

Jim Krumm, senior vice president of BankFirst, also testified in his deposition that he saw the enormous hole when he visited the Project site in March or April of 2005 to meet a representative of a potential participant bank on the Project.[89] Mr. Krumm testified as follows:

> Q. Back to the hole that you saw when you drove in, obviously readily observable to anybody that walked on the site.
>
> A. Yes.
>
> Q. Can you give me any more what you believe the dimensions might be of the hole?
>
> A. It was big. I have no idea how to tell you how deep and wide it was. I didn't -- I wasn't that -- I wasn't there to determine how big the hole was. It was just a big hole in the ground. It was deep and it was long and it was, you know.
>
> Q. And your testimony is you don't have an understanding of why that hole would have been dug in that location or to that depth.
>
> A. They were eventually going to put a building in there, you know.
>
> Q. And was the building that they were going to put in there one of the buildings that you guys were marketing in the pictures in the -- you've seen the renderings of the project?
>
> A. Yes.

---

[89] *Jim Krumm Depo.,* 95:2 to 99:11; 107:10 to 110:8 [R.5507 A, Exhibit "3"]; The Bank misstates the law when it argues that actual notice of work does not trigger the relation back rule. The cases cited by the Bank relate to actual notice of *offsite* lienable *design work.* Under Utah law, offsite lienable design work does not constitute first work even if the lender has actual notice of such work or if there is record notice of such work. Offsite design work does not constitute visible work on site; *See Corrected Order*, at p. 8-9 [R.7850] attached hereto as *Second Addendum to the Brief.*

Q. -- one of the buildings that was going to go in there, one of the wings of the main building?

A. Yes.[90]

Given the size of the excavation abutting State Street in Orem, it was obviously visible to anyone who visited the site that construction was underway. It was "*gigantic*" and the two holes existed "*conspicuously so.*"[91] The representative of title company working on the loan closing, Adella Pearson of Equity Title Company, inspected the property, and testified in her deposition that she observed the hole... .[92] After inspecting the property and being aware of the fact that excavation had already begun, Ms. Pearson completed and transmitted the *Mechanics Lien Risk Analysis* form advising the title company that in fact "excavation had begun."[93] Pearson further testified that from an underwriting perspective, she was concerned that work had taken place.[94] The title company's *Mechanics Lien Risk Analysis* reads:

> ¶ 32 – If work of improvement has commenced describe work being done. [Answer] – The tower is complete and excavation has begun.
>
> ¶ 37 – Have all potential lien claimants been paid in full. [Answer] – No. If not, how much remaining to be paid? [Answer] – This will be paid at close and release (same time).

---

[90] *Id.,* 107:10 to 110:8 [R.5507 A, Exhibit "3"].
[91] *Larry Myler Depo.*, 31:17-23; 32:6-12 (hole is 12 foot deep); 43:9-18; 61:6-25; 114:5-13; 202:14-18 [R.5507 A, Exhibit "4"]; Deposition Exhibit 96; *Brett Harris Depo.*, 115 [R.5507 A, Exhibit "2"].
[92] *Adella Pearson Depo.*, 50:21-25; 58:25 to 59:9; 61:5-20 [R.5507 A, Exhibit "5"].
[93] Deposition Exhibit 165; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].
[94] *Adella Pearson Depo.*, 58:25 to 61:21 [R.5507 A, Exhibit "5"].

¶ 38 – Are there any recorded mechanics' liens? [Answer] Yes...$150,515.20 (same time).[95]

None of the case law from Utah or any other jurisdiction cited by the Bank holds that an excavation of such an enormous size, for the purpose of a footing and an underground parking structure, does not qualify as notice to a person using reasonable diligence. How a massive excavated site measuring approximately 22 feet deep, 400 feet long and 170 feet wide would not be visible to an individual using reasonable diligence is a question left unanswered by the Bank. When coupled with the law that mechanics lien statutes should be construed liberally and in favor of the lien claimants, it is irrefutable that the excavation and shoring work done in fall 2004 and early 2005 qualifies as "commencement of work."

B. The Bank Was Actually Aware of the Excavation Work Prior to Recording the Bank Deed of Trust.

As previously outlined, the Bank had actual knowledge that work had commenced since it helped facilitate an unsecured loan to the Developer.[96] Krumm of BankFirst knew that the excavation work would proceed prior to the time the construction loan would be finalized and testified to the same in his deposition.[97]

---

[95] Deposition Exhibit 165; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].
[96] *Jim Krumm Depo.*, 36:23-25; 37:1-18; 99: 3-11[R.5507 A, Exhibit "3"].
[97] *Jim Krumm Depo.*, 36:23 to 37:18; 65:1-9; 99:3-11 [R.5507 A, Exhibit "3"].

Jim Krumm, who originated the loan and was the senior vice president of BankFirst, also had discussions with management of the Bank (BankFirst) and perhaps his own legal department about the fact that excavation had started and was concerned with broken priority.[98] Krumm and the Bank were concerned about the potential of liens from those that performed the excavation work and wanted to be sure that they were protected from liens from those that did the excavation work by title insurance.[99]

In furtherance of its commitment to protect the Bank's first lien security interest, the Title Company obtained a lien release from Wadsworth at the time that the loan closed. Clearly, the Title Company and the Bank were aware that those entities that had performed work prior to the loan closing.[100] They made sure that the contractors were paid from the first draws of the June, 2005, including Reynolds Bros., Wadsworth and the General Contractor.[101] This was confirmed in the answers to questions in the Bank documents which stated in response to question #10 that "the title company has agreed to protect the Bank's first lien security interest from any other liens arising from the preliminary site work."[102]

---

[98] *Id.*, 93:17 to 95:9; 107:10-25; 108:1-25 [R.5507 A, Exhibit "3"].
[99] *Id.*
[100] Deposition Exhibit 165, ¶ 32, 37, 38; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].
[101] *Jim Krumm Depo.*, 102 [R.5507 A, Exhibit "3"]; Deposition Exhibit 190.
[102] *Id.*, 54 [R.5507 A, Exhibit "3"]; Deposition Exhibit 189.

Another document that provided compelling evidence about whether or not work had commenced on the Project was the First American Title Company's Mechanics Lien Risk Analysis form prepared by Equity Title Company. In the form Question #32 asks: "If work of improvement had commenced describe the work being done." The response written in by Adella Pearson of Equity Title Company was "The 'Tower' is complete and excavation has begun."[103] Pearson acknowledged the massive hole was to the west of the Icon Tower which was the location of the south tower.[104] Equity Title, the title company handling the closing, and First American, the insurance company that issued the title policy, had concerns about the fact construction had commenced as further testified to by Pearson.[105] Equity Title acknowledged in its report to First American that excavation construction work had taken place and was the subject of unpaid mechanic's liens that needed to be paid at closing.[106]

The conclusion that visible construction work which commenced on the Project prior to the recording of the Bank's trust deed as required by Utah Code § 38-1-5 should be affirmed.

---

[103] Deposition Exhibit 165; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].
[104] *Adella Pearson Depo.*, 37:25 to 38:1-9; 50:20-25 [R.5507 A, Exhibit "5"].
[105] *Adella Pearson Depo.*, 58:25 to 61:21 [R.5507 A, Exhibit "5"].
[106] Deposition Exhibit 165; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].

VI. PURSUANT TO UTAH CODE § 38-1-5 MECHANIC'S LIENS RELATE BACK TO AND TAKE EFFECT AS OF THE COMMENCEMENT TO DO WORK.

In its Order, the District Court held that the excavation for the underground parking and the mat footings in September 2004 and early 2005 constituted the commencement of work on the Project pursuant to Utah Code § 38-1-5, and that all valid mechanic's liens related back to the commencement of the work in September 2004 and have priority over any encumbrance which attached subsequent to September 2004.[107]

The District Court based this conclusion on its legal conclusions that (1) in accordance with Utah Code § 38-1-5 and *E.W. Allen Associates, Inc. v. FDIC*, 776 F. Supp. 1504 (1991), to determine the priority date of a mechanics' lien against another encumbrance, the Court must look to the commencement of work on the structure or improvements; (2) the substantial excavation work done in September 2004 through early 2005 was not mere site preparation work; rather it was clearly the commencement of a large construction project; (3) the substantial excavation work done in September 2004 through early 2005 constitutes constructive notice that work had commenced on the Main Building of the Project and that construction was underway; and (4) the substantial excavation work done in September 2004 through early 2005 also constituted

---

[107] *See Corrected Order*, at p. 8-9 [R. 7850] attached hereto as *Second Addendum to the Brief*.

actual notice to both the Bank and the title company that work had commenced on the Main Building of the Project and that construction was underway.[108]

A. Mechanics' Liens Relate Back to Commencement of Construction for the Purpose of Determining Priority.

In determining priority between the liens of the Claimants and the trust deeds of the Bank, there is a specifically created statutory preference for mechanics' lienholders in that mechanic's liens relate back to, and take effect as of the time of the commencement to do work on the buildings, structures or improvements constituting the Project. Utah Code § 38-1-5 provides in pertinent part as follows:

> The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground... .

This statutory preference for mechanics' lienholders has been upheld by Utah courts. For example, the court in *First of Denver Mortgage Investors v. Zundel and Assoc.* held that:

> Materialmen's and mechanics' liens resulting from materials furnished or labor performed relate back to and attach as of the date

---

[108] *See Corrected Order*, at p. 8-9 [R. 7850] attached hereto as *Second Addendum to the Brief*.

of the commencement of the first work on the improvement or structure involved.[109]

In the present matter, this Court should affirm the specifically created statutory preference followed by the District Court, providing that the Claimant's liens relate back to, and take effect as of, time of commencement to do work or furnish materials for the building, improvement, or structure.

B. Mechanic's Liens Have Priority Over Trust Deed Recorded After the Commencement of Construction.

Mechanics liens have priority over any mortgage or trust deed recorded subsequent in time to the commencement of visible construction work. It is undisputed that visible construction work commenced on the Project in September 2004 through early 2005 with the beginning of the excavation and gunite and soil nailing work relating to the underground parking on the Project. As a result, the numerous mechanics' liens filed in 2008 by the Claimants relate back in time and take effect as of September 2004. While the Bank has tried to argue that this was a collection of separate projects this argument is a legal

---

[109] *First of Denver Mortgage Investors v. Zundel and Assoc.*, 600 P.2d 521 (Utah 1979); *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982) (purpose of mechanics' lien act is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to value of property of another by their materials or labor); *Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Development Co.*, 784 P.2d 1217, *cert. denied* 795 P.2d 1138 (Utah 1989) (the phrase "commencement to do work," within the meaning of statute providing that liens relate back to, and take effect as of, time of commencement to do work or furnish materials and have priority over any lien subsequent to time when building, improvement, or structure was commenced, is construed in favor of lien claimant).

argument not a factual one. There is no witness testimony or a document that supports that position. As a result, the Claimants' mechanics' liens have priority over the subsequent trust deeds recorded by the Bank against the property in June 2005 and thereafter.

In determining the priority between the mechanics' liens of the Claimants and the trust deeds of the Bank, this Court should affirm the statutory preference followed by the District Court in favor of the Claimants and determine that the Claimants' liens relate back to, and take effect when work commenced which was before June 2005. This Court should also affirm the District Court's ruling that the Claimants have priority over all Bank trust deeds subsequent in time as a matter of law.

The determination that the Claimants' mechanic's liens related back to, and took effect as of the commencement to do work in September 2004 as required by Utah Code § 38-1-5 should be affirmed.

VII. THERE WAS NO MATERIAL ABANDONMENT OF THE PROJECT.

A. The District Court was Correct in Determining that the Undisputed Facts Showed that There was No Material Abandonment of the Project.

In its Order, the District Court held that at no time was the Project materially abandoned by the Bank, the Developer, the Architect, Orem City, or the Claimants but was a single project constructed under a common plan and

prosecuted with reasonable promptness in accordance with Utah jurisprudence.[110]

The District Court based its conclusion on the undisputed facts that:

(1) Mr. Larry Myler was the developer of the Project and was the principal contact person for each of the entities that developed the Project including Western Oasis, Tower Development Services, Midtown LLC and Midtown Village Joint Venture;

(2) Midtown Village Joint Venture was the successor of the interests of Western Oasis, Tower Development Services, and Midtown LLC, in the development of the Project;

(3) Marshall/BankFirst was the lender that worked with Mr. Myler from July 2004 until BankFirst funded the $42 million loan in June 2005;

(4) Marshall provided the developer with a loan commitment letter for the Project in August 2004, required from the developer a $15,000 good faith deposit for the Project loan in August 2004, helped arrange and fund a $562,000 loan to permit the Developer to commence excavating the Project in September 2004, developed and created its [Bank's] marketing package in September 2004 and began acquiring subscriptions from participant banks in October 2004, persisted in its [Bank's] efforts to finance the Project until it succeeded in having the loan closed in June 2005, acquired subscriptions from participant banks in October and November 2004, and approved a stronger guarantor for the Developer to improve the marketing package in December of 2004, maintained existing participant banks and acquired subscriptions from additional participant banks in 2005;

(5) At all material times the architect was Ken Harris Architect;

---

[110] *See Corrected Order*, at p. 9-10 [R. 7850] attached hereto as *Second Addendum to the Brief*.

(6) At all material times the Project was a mixed use project with residential condos, offices, and retail spaces in a main building situated in a "U" shape consisting of South, North and West wings with a central courtyard surrounded by an Icon Tower. The Project was designed to have underground parking with approximately 98,000 square feet of retail on the first floors, 106,000 square feet of office space on the second floors, and 243 residential condominiums on the third through seventh floors. More than 50% of the 243 residential condos had been pre-sold and more than 50% of the retail space had been preleased, before and while, BankFirst was marketing the financing package to participant banks;

(7) At all material times there was a common plan on the Project – the Project remained a mixed use project with essentially the same make up in the uses;

(8) BankFirst and its bank representative to the Project were actively engaged in efforts to finance this Project, and about five months after the work on the excavation stopped, the loan was committed and closed;

(9) From the loan closing on June 15, 2005, $650,000 from the loan proceeds was used to pay for the excavation work performed in September 2004 and early 2005 and $150,000 from the loan proceeds was used to pay for the gunite and soil nailing shoring work;

(10) At the request of BankFirst for an additional guarantor, Larry Myler made efforts to bring Mr. Jerry Moyes in as an additional guarantor on the construction loan for the Project. Those efforts succeeded and Mr. Moyes became an additional guarantor on the loan to BankFist in order for Midtown Village JV to obtain the loan from BankFirst;

(11) There were ongoing efforts by BankFirst to market and close the loan during the fall of 2004 up through and until the loan closed in June of 2005;

(12) Mr. Myler and his various entities remained involved on the Project after Mr. Moyes got involved as a guarantor for the loan; and

(13) Ellsworth Paulsen Construction remained involved with the Project even though it worked with two other contractors during the course of the Project: Bud Bailey Construction was a co-general contractor before the loan closed, and Big-D was the co-general contractor after the loan closed.[111]

By its Order, the District Court also held that:

(1) The Bank did not materially abandon the Project;

(2) Larry Myler and his entities did not materially abandon the Project;

(3) The Project was a single project constructed under a common plan;

(4) Any design changes that occurred were never such that the changes would signal that the Project that had been conceptualized was abandoned and a new different project was being commenced;

(5) The same project that was commenced with excavation for the mat footings and the underground parking was prosecuted, under the circumstances of the Project, with reasonable promptness without material abandonment;

(6) Any delay in the Project resulting from financial problems did not constituted an abandonment of the Project given the continued efforts by those involved including the Bank to resolve those financial problems and the success of those efforts within approximately five months resulted in the construction loan sold to participant banks, funded and closed;

---

[111] *See Corrected Order*, at p. 5-9 [R. 7850] attached hereto as *Second Addendum to the Brief*.

(7) No cessation of work on the Project occurred that would be sufficient to put a reasonable observer on notice that the Project had been abandoned;

(8) The Project did not stop and another project was not initiated; and

(9) The Project was not materially abandoned from the time the excavation work commenced in the fall of 2004 to the time the loan closed in June 2005.[112]

Accordingly, each of the undisputed facts and conclusions are correct and should be affirmed.

Utah law is clear on what constitutes material abandonment of a construction project. Utah follows the majority rule on this legal principal. "For a contractor's lien to relate back to the commencement of work or the supplying of materials by another contractor however, both contractors' projects must have been performed in connection with what is essentially a single project performed under a common plan prosecuted with reasonable promptness and without material abandonment."[113]

"[A] construction project has been materially abandoned when a reasonable observer of the site would be on notice that the persons who performed work apparently did not intend to continue to completion.[114] However,

---

[112] *See Corrected Order*, at p. 9-10 [R. 7850] attached hereto as *Second Addendum to the Brief.*
[113] *Calder Bros. Construction v. Anderson*, 652 P.2d 922, 924 (Utah 1982).
[114] *Nu-Trend Electric v. Desert Federal S&L*, 786 P.2d 1369, 1371 (Utah App. 1990).

temporary cessation of work through a loss of funding does not necessarily mean a project is materially abandoned.[115]

A temporary halt to construction activity is not a "material abandonment." The *Ketchum Konkel* court cited a Minnesota Supreme Court decision that is somewhat analogous to the case at bar. The Minnesota court held that the excavation of a basement for a building was the commencement of work on the project and that it was one continuous project even though the excavation took place prior to the purchase of the land or the contracts to build vertically were signed, two months before any other additional work took place. The Minnesota court ruled that "many things might cause a building project to be temporarily halted, but if there is no abandonment or severance of the contract it may still be entire and continuous in nature within the contemplation of the statute."[116]

---

[115] *Ketchum Konkel, Barret, Nickel & Austin v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 1226 (Utah App. 1989); While the Claimants conceded that ordinarily material abandonment is a fact issue, it is not a fact issue in this case since none of the witnesses testified that the Project was materially abandoned but rather that the Project was not abandoned. Under the present case there is no fact issue. Just as negligence can be found as a matter of law if all of the witnesses say the defendant ran a red light, so can a conclusion that there was no material abandonment if those related to the project state under oath that they never left off of pushing the project forward from 2004 to when the loan was closed in June of 2005. As will be shown herein, the project was not materially abandoned from the time it was commenced in the late summer of 2004, to the date the work was suspended due to non-payment. What follows hereafter is not the bald conclusory arguments of counsel, but the unrebutted testimony of witnesses who were the participants in the development.

[116] *Id.*

The *Ketchum Konkel* court also cited a Maryland decision that held that a 15 month cessation of the construction of a nursing home because of difficulties in obtaining a state approval, bank financing and completion bonds did not constitute material abandonment of the project. "The issue more correctly stated is whether there had been sufficient cessation of work to constitute the end of construction on one project and the initiation of work on another." The Maryland court found that, although there was a significant cessation of work, it was due to reasons not unheard of in construction—loss of financing, failure to get a bond, and state approval—and that there was no evidence of an intention to give up the project. An additional reason the court found no material abandonment was that the project proceeded with little change in the original plans.[117] "What is critical is that all of the work was done pursuant to a single project contemplated by the owners."[118]

B. The Bank Failed to Provide Facts Showing the Project Was Materially Abandoned.

The Bank's Brief on this issue claims the District Court impermissibly weighed evidence. However, there were absolutely no material facts in dispute. None. Literally every witness examined and every document produced supports the fact that the Project was continuous and ongoing. The Bank's material abandonment argument is not supported by the testimony of the witnesses or the

[117] *Id.*
[118] *Duckett v. Olsen*, 699 P.2d 734, 736 (Utah 1985).

documents. There was no genuine issue of fact that would support the position that the Project was materially abandoned.

Despite this fact, the Bank has asserted that the Project was abandoned and the priority date for first visible construction work occurred after it filed its deed of trust in June 2005. In support of its argument the Bank claims there were changes in the owners, general contractor, scope of work, design, and alleged disconnection or lack of continuity between the site excavation for the Main Building and the vertical construction of the Main Building. In presenting this argument the Bank has selectively put forth limited facts which are not material or pre-date the commencement of construction. The Bank also has selectively picked excerpts of deposition testimony while leaving out portions of testimony that more fully explain the correct context in which that testimony was given. In many cases, the testimony the Bank had taken out of context contradicts the Bank's position on the abandonment issue. The District Court was not misled by this attempt because simply put the undisputed facts show otherwise.

The Bank has not cited any deposition testimony wherein a witness testified that they believed or concluded that the Project was abandoned. The closest thing that the Bank has as evidence that the Project was abandoned is

their response to a request for admission signed, not by a representative of the Bank, but by counsel for the Bank.

Counsel for the Bank responded to Request for Admission No. 2 stating that:

> Defendants informed Larry Myler and Dan Christensen in or about late 2004 or early 2005 that they did not qualify for financing for the 'Midtown Project' as a result of Dan Christensen's poor credit history. At that point in time Defendants abandoned efforts to provide financing for the 'Midtown Project.[119]

However, the senior vice-president and lead of the Bank Krumm disputed the conclusion of counsel for BankFirst that BankFirst abandoned efforts to provide financing for the Midtown Project when he testified that BankFirst kept working on the financing even though there were hurdles to overcome. The pertinent portion of Mr. Krumm's deposition testimony was as follows:

> Q. Okay. Then the next sentence says, "At that point in time defendants abandoned efforts to obtain financing for the Midtown project." Based on our discussion today, I believe you disagree with that statement that the defendants abandoned their efforts to obtain financing in October 2004?
>
> A. Abandoned is kind of a word but no – I guess the answer is -- what was the question again?
>
> Q. The sentence says, "At that point in time," and I think we've isolated that down to the end of October 2004, "at that point in time defendants abandoned efforts to provide financing for the Midtown project." You disagree with that statement that Marshall Investments and BankFirst abandoned their efforts to obtain financing at the end of October 2004.

[119] Deposition Exhibit 194; *Jim Krumm Depo.*, 136 [R.5507 A, Exhibit "3"].

A. **Yes. Because we continued to try and finance it**. (Emphasis added.)[120]

As stated above: "What is critical is that all of the work was done pursuant to a single project contemplated by the owners."[121] The present case before this Court constitutes a continuous project that did not change in purpose and intent; neither by the Developer, the Bank and those who provided the design and construction work. This Project didn't start as a mixed use project and turn into a golf course. The only thing the Project had was a temporary cessation of work through a loss of funding. When the parties overcame that funding hurdle the Project continued using the same participants and the same plans at the same location.

C. A Change in Project Participants is Not a Material Abandonment.

The undisputed fact is that after the first monies were procured for the Project from an affiliate of the Bank (BankFirst) in 2004, the Bank continued seeking and obtaining participant banks for the project.[122] While the Bank was soliciting participant banks, the Developer was seeking a guarantor of sufficient strength for the overall Project financing and additional capacity from its general contractor, by another construction partner whose financial statement would be

---

[120] *Jim Krumm Depo.*, 137:5-16; 138:5-14 [R.5507 A, Exhibit "3"].
[121] *Duckett v. Olsen*, 699 P.2d 734, 736 (Utah 1985).
[122] Deposition Exhibits 184,186,187,188; *Jim Krumm Depo.*, 43, 48, 51, 54 [R.5507 A, Exhibit "3"].

sufficient in the eyes of BankFirst.[123] Once these hurdles in the development of the Project were overcome by the Developer and the Bank, the construction loan was closed and the Project continued.

D. The Bank's Principal Witness Agrees the Project Was Not Materially Abandoned.

The Bank never materially abandoned the Project. The position maintained by the Bank lacks any factual support or credibility. Vice President, Jim Krumm, was the Bank's principal contact with the developer and testified that after the subject excavation work was performed the:

(1) BankFirst was continuing to tell participant banks that had already subscribed that they were working on getting the deal done;[124]

(2) BankFirst was continuing to market the project to potential participant banks;[125]

(3) BankFirst was working with the Developer to overcome concerns or objections raised by some potential participant banks;[126]

(4) BankFirst was drafting and issuing a new marketing brochure with updated information making the deal a stronger more acceptable deal;[127]

---

[123] Larry *Myler Depo*, 92:11 to 93:12; 129:4-15; 148:3 to 149:7 [R.5507 A, Exhibit "4"].
[124] *Jim Krumm Depo.*, 56: 24 to 57:5; 70:14 to 71:6; 86:11-15 [R.5507 A, Exhibit "3"].
[125] Deposition Exhibits 155,184,186; Larry *Myler Depo.*, 35 [R.5507 A, Exhibit "4"]; *Jim Krumm Depo.*, 43, 48; 86:5-10 [R.5507 A, Exhibit "3"].
[126] *Jim Krumm Depo.*, 44:24 to 45:5; 46:3-21 [R.5507 A, Exhibit "3"].
[127] Deposition Exhibit 155; *Larry Myler Depo.*, 35 [R.5507 A, Exhibit "4"]; *Jim Krumm Depo.*, 77:11-22; 78:6 to 79:10; 86:5-15 [R.5507 A, Exhibit "3"].

(5) BankFirst was using its best efforts to get the financing package completed;[128]

(6) BankFirst was trying to close the loan so BankFirst could earn a $900,000 fee upon closing;[129]

(7) BankFirst knew that more than 50% of the condominiums had been sold and that more than 50% of the retail space had been pre-leased.[130]

As previously cited, Mr. Jim Krumm, the senior vice-president and lead of the Bank for this Project, disputed the conclusion of counsel for the Bank, that the Bank abandoned efforts to provide financing for the Midtown Project. Mr. Krumm testified that the Bank kept working on the financing even though there were hurdles to overcome. At one point there were objections raised by some potential participant banks about the lack of strength by one of the guarantors. The Bank and the Developer worked continuously to solve those objections and found another acceptable guarantor in the form of Jerry Moyes. A number of banks signed up based upon the 1st loan package subscription. The Bank kept those subscribers on board and kept marketing through the "suspension" period, based upon the first package even while working on drafting second marketing package. After the second stronger package was issued, the Bank obtained additional participant banks (in addition to the previously obtained participant

---

[128] *Jim Krumm Depo.*, 34:21 to 35:11 [R.5507 A, Exhibit "3"].
[129] *Jim Krumm Depo.*, 89:7-12 [R.5507 A, Exhibit "3"].
[130] Deposition Exhibit 181, P. 1; *Jim Krumm Depo.*, 27 [R.5507 A, Exhibit "3"].

banks) sufficient to do the deal.[131] All this work in completing the loan funding occurred during the period the defendants claim the project was in a state of abandonment.[132]

From the time the term sheet was given by the Bank to the Developer in July 2004 until the loan closed in June 2005 there was no change in the lender. The Bank had a working knowledge of the history of the Project that it was trying diligently to fund. The Bank cannot claim that the Project was abandoned and it was prejudiced when the undisputed facts show otherwise.[133]

E. There was No Material Abandonment of the Common Purpose for the Project by the Owner.

The Bank argues that the Project was abandoned after the excavation of the pit ceased in January 2005 and before work recommenced in October 2005, when excavation for spot footings began.[134]

The critical undisputed facts from the mouths of the deposition witnesses (as opposed to arguments of the Bank) are that the Developer, the owner of the

---

[131] Deposition Exhibit 187; *Jim Krumm Depo.*, 51; 138:23 to 140:14 [R.5507 A, Exhibit "3"].

[132] *Jim Krumm Depo.*, 54 [R.5507 A, Exhibit "3"]; *See* Deposition Exhibit 188 attached to the Reply Memorandum in Support of the Motion for Partial Summary Judgment which is a collection of some of the e-mails of BankFirst representatives about their efforts from October 2004 to June 2005 to get the financing package completed [R.5337-5507].

[133] Deposition Exhibit 153,181, 182, 184-187, *Larry Myler Depo.*, 26:22 to 27:17[R.5507 A, Exhibit "4"]; *Jim Krumm Depo.*, 27; 39:10-23; 32, 36:23 to 37:18; 43, 45, 48, 51, 54 ; 65:1-9 [R.5507 A, Exhibit "3"].

[134] *See* a Project Timeline attached hereto as *Sixth Addendum to the Brief*.

Project from the beginning, never abandoned the Project. The Bank cites out of context and against extensive testimony to the contrary an alleged expression by the Developer that "the project was dead." That is not what the Developer testified. The actual testimony from the Developer states his efforts were to prosecute the Project to completion.[135] The Developer testified that he worked persistently and consistently from the time of the grounding breaking in September 2004 to the middle of June 2005 to: (1) get the financing completed; (2) get Orem City bonds issued; (3) keep buyers that had purchased units still on board with the project; and (4) keep the designers and contractors fully engaged on the design and construction issues.[136] In fact, the Developer stated further that:

> Q. But at the same context, was that any reason for you to consider abandoning the project, giving up on the project, or was it just something you dealt with and moved forward to get an additional contractor to help with Ellsworth-Paulsen?
>
> A. I did not abandon the project. I went on a hunt for a new company to join and we found them.[137]

Likewise, Jim Krumm, the senior vice-president of BankFirst, himself testified that the Developer never abandoned his efforts to get the Project

---

[135] *Larry Myler Depo.*, 92:11-21; 93:4-12 [R.5507 A, Exhibit "4"].
[136] *Larry Myler Depo.*, 92:11-21; 93:4-12; 118:4 to 119:24 [R.5507 A, Exhibit "4"].
[137] *Larry Myler Depo.*, 93:4-12 [R.5507 A, Exhibit "4"].

developed.[138] In fact, the real estate agents working for the Developer did not abandon the Project but kept in contact with those who had purchased 50% of the Project units throughout the winter and summer of 2005, by, among other methods, sending out newsletters updating them on the status of the Project.[139]

The Bank states in its Brief that Tower Development was to be the developer of the Project. That statement is not accurate. The Bank confirmed in its term sheet letter of July 28, 2004, addressed to the Developer, that the borrower would be a newly formed limited liability company, a single asset company.[140] That is in fact what happened. The Developer first formed Midtown Village LLC and then, after the new guarantor Jerry Moyes was added to the developer team, they formed Midtown Joint Venture LLC.[141] The Bank was fully aware at all times of the Developer entities as it acknowledges in its July and August 2004 commitment letters that a new LLC would be formed.[142] There is no basis for the Bank to argue that the different Developer entities permits the Bank to now deem the Project "materially abandoned" when the Bank never considered the Project abandoned during the course of the Project.

---

[138] *Jim Krumm Depo.*, 45:13 to 48:5; 113:10 to 114:15; 138: 5-14 [R.5507 A, Exhibit "3"].
[139] Deposition Exhibits 96,154,158; *Brett Harris Depo.*, 115 [R.5507 A, Exhibit "2"]; *Larry Myler Depo.*, 31, 42, 123:25 to 124:23 [R.5507 A, Exhibit "4"].
[140] Deposition Exhibit 180; *Jim Krumm Depo.*, 23 [R.5507 A, Exhibit "3"].
[141] *Larry Myler Depo.*, 116; 25 to 118:3 [R.5507 A, Exhibit "4"].
[142] Deposition Exhibits 180,181; *Jim Krumm Depo.*, 23, 27 [R.5507 A, Exhibit "3"].

The Bank argues in its Brief that the fact that Western Oasis, Tower Development, and Midtown Village are different entities somehow creates a fact issue regarding abandonment. Quite apart from the fact that all of the entities referred to were the Developer owned and managed,[143] numerous cases have held that changes in owners or successive owners do not negate the relation back doctrine, nor are multiple owners evidence of abandonment.[144] Under Utah law, the question is whether the project is essentially a single project with a common plan prosecuted with reasonable promptness.[145] In all of its dealing on the Project, the Bank dealt with the Developer as the authorized representative of the owner and developer.[146] That never changed.

The Bank also refers to documents from a third party to this litigation, Orem City, who was heavily involved in the deal. Those documents clearly corroborate the common nature of the developer for the Project. Orem City and

---

[143] Mr. Myler used his existing land holding entity Western Oasis when he purchased the ground. As construction started, he transferred the property into another of his entities – Tower Development Services. As he brought in other investors he created single asset limited liability companies to proceed with the project. Throughout all of the development, Myler was the manager for the entities that were developing the project. *Larry Myler Depo.*, 152:15 to 154:12; 136:2-6 [R.5507 A, Exhibit "4"].

[144] *First of Denver Mortg. Investors v. CN Zundel*, 600 P.2d 521 (Utah1979)(Subdivision with successive owners and separate original contractors did not effect the priority of the liens to the trust deed); *Vasquez v. Village Center, Inc.*, 362 S.W.2d 588 (Mo. 1962)(Developer that did not come into existence until after work of mechanic's was in place did not effect the relation back effect of the excavation).

[145] *Calder Bros.*, 652 P.2d, *supra* at 924.

[146] *Jim Krumm Depo.*, 30:5-12 [R.5507 A, Exhibit "3"].

the Developer entities entered into a series of Development Agreements commencing in 2002 continuing after the loan was closed. The Development Agreement dated July 19, 2005[147], about a month after the loan closed, is between Orem City "and the following entities:

> Western Oasis Properties, LC, a Utah Limited Liability Company with its principal offices at 320 South State Street, Orem, Utah 84058;
>
> Tower Development Services, Inc., a Utah Corporation with its principal offices at 320 South State Street, Orem, Utah 84058;
>
> Midtown Village LLC, a Utah Limited Liability Company with its principal offices at 320 South State Street, Orem, Utah 84058.

The Developer (Larry Myler) signed the Development Agreement on behalf of each of the entities all of which were located at the project address. A later Development Agreement entered into on Feb. 21, 2006[148] included all of the foregoing Developer entities but added another Developer entity:

> Midtown Joint Venture, L.C., a Utah Limited Liability Company with its principal offices at 320 South State Street, Orem, Utah 84058.

Once again, the Developer (Larry Myler) signed the new Development Agreement on behalf of all four of the Developer entities all of which again were located at the project address.

---

[147] *See* Exhibit "B" to the Reply Brief in Support of Motion for Partial Summary Judgment [R.5337-5507].

[148] *See* Exhibit "C" to the Reply Brief in Support of Motion for Partial Summary Judgment [R.5337-5507].

What can be seen from the undisputed facts is that while there is some fluidity about ownership entities at different points during the lending and construction process, the Developer is the common owner and manager who unyieldingly pressed the Project forward. The Developer and the essential single nature of the project are the continuity of a single project performed with a common plan.

F. There was No Material Abandonment on the Part of the Contractors and Designers.

The Bank misconstrues the undisputed facts when it claims that the owner was "hiring one general contractor after another." The owner hired Ellsworth Paulsen to construct the Icon Building.[149] The owner then hired Ellsworth Paulsen to construct the Main Building with its three wings.[150] The Bank marketed the Project in its first package with Ellsworth Paulsen as the general contractor. According to the Developer, some potential participant banks of the Bank had a concern about the strength of Ellsworth Paulsen.[151] At the request of the Bank, the Developer and Ellsworth Paulsen found another contractor to team up with Ellsworth Paulsen and participate in the Project – that was Bud Bailey Construction.[152] The Bank represented in its second marketing package that Ellsworth Paulsen was the general contractor to construct the Main Building with

[149] Deposition Exhibit 4; *Allen Washburn Depo.*, 48 [R.5507 A, Exhibit "7"].
[150] Deposition Exhibit 18; *Allen Washburn Depo.*, 91 [R.5507 A, Exhibit "7"].
[151] *Larry Myler Depo.*, 89:25 to 90:19 [R.5507 A, Exhibit "4"].
[152] *Larry Myler Depo.*, 90:20-24 [R.5507 A, Exhibit "4"].

its three wings and that Bud Bailey Construction would serve as the supervisory contractor and provide a guarantee.[153] Between the time of the ground breaking in September 2004, to the time of the closing of the loan in 2005, Ellsworth Paulsen remained as the general contractor and Bud Bailey Construction was added as a supervisory contractor to the team. To accomplish that goal, they formed a joint venture and entered into a contract with the owner dated April 25, 2005.[154]

Again the material facts are not in dispute. But contrary to the portrayal of the Bank this is hardly the owner "hiring one contractor after another." It is clear that the addition of Bud Bailey Construction as a joint venture partner with Ellsworth Paulsen was done to satisfy the Bank's requirements and concerns.[155] Simply put, this clearly reflects that the Project was going forward, not that it was materially abandoned.

Virtually every case that has considered the issue has held that multiple original contractors has no effect on the priority of the liens nor is it an indicia of abandonment. For example, *Calder Bros.* holds that as long as there is continuity in the project, the claims of multiple prime contractors will relate

---

[153] Deposition Exhibit 155 p. 12; *Larry Myler Depo.*, 35 [R.5507 A, Exhibit "4"].
[154] Deposition Exhibit 19; *Allen Washburn Depo.*, 94 [R.5507 A, Exhibit "7"].
[155] After the loan closed, Bud Bailey did not want to participate further in the Project. Big-D Construction was obtained by the Developer as an alternative to Bud Bailey. Big-D was accepted by BankFirst as the new joint venture partner of Ellsworth that would proceed with the construction. *See Allen Washburn Depo.*, 96 [R.5507 A, Exhibit "7"].

back.[156] Similarly, in *Duckett v. Olsen* the Court expressly held that the presence of multiple prime contractors does not affect priority as long as it is intended for a single project.[157]

The Bank argues that it is critical that the excavation and shoring work for the Main Building was performed by two contractors (Reynolds and Wadsworth) and the structure of the Main Building constructed by another contractor (EP/Big-D JV). The Bank would have the Court ignore the relation back principal established by Utah Code Ann. § 38-1-5; i.e.; that all lien claims relate back to one common date – the date when construction was first commenced upon the ground. All contractors who performed work on the Project are, under Utah law, on an equal footing when it comes to determining priority between the contractors and any lending institution.[158]

Ellsworth Paulsen filed a Notice of Commencement with the Utah County Recorder of its $59 million contract contemporaneously with the excavation work being done by Reynolds and Wadsworth.[159] The excavation was all in the scope of Ellsworth Paulsen's contract with Tower Development. In fact, Ellsworth Paulsen provided construction management services during the time the excavation and shoring work was done. Ellsworth Paulsen was paid $150,000 at

---

[156] *Calder Bros.*, 652 P.2d, s*upra* at 924.
[157] *Duckett v. Olsen,* 699 P.2d 734 736 (Utah 1985).
[158] *See* Utah Code § 38-1-5.
[159] Deposition Exhibit 14; *Allen Washburn Depo.*, 77 [R.5507 A, Exhibit "7"].

the time of the Bank loan closing which included the costs of that supervisory work.[160]

The contract between Tower and Ellsworth Paulsen included the excavation work. The later contract between Tower and Ellsworth/Paulsen Bud Bailey Construction included the same excavation. The last contract between Midtown JV and EP/Big-D also included the excavation work for the Main Building and the overall construction of the Project.[161] It is undisputed that the $800,000 worth of excavation and shoring work performed from September 2004 to January 2005 was part of the construction of the Main Building. It is also undisputed that not all of the excavation work was completed in the fall and winter of 2004. The Bank in its haste to argue the excavation as a separate project, neglected the undisputed fact that excavation was always part of the scope of the construction work required the contracts to build the Main building. This excavation work was not completed in the fall/winter of 2004. In fact, after the final funding came through in June 2005, the remaining portions of the north tower and the central plant were excavated by Reynolds Brothers Excavation.[162] The excavation for the west tower was never completed.

---

[160] Deposition Exhibit 190; *Jim Krumm Depo.*, P.102 [R.5507 A, Exhibit "3"].
[161] Deposition Exhibits 18, p. 37; Appendix "B" to Reply Memorandum in Support of Motion for Partial Summary Judgment [R.5337-5507]; Deposition Exhibits 19; 21, 101 (Division 2, Lines 8-11, 19); *Allen Washburn Depo.*, 91,94,100 [R.5507 A, Exhibit "7"].
[162] Deposition Exhibit 73.

The Utah Mechanics Lien Statute at § 38-1-5 provides that all work on an improvement or building relates back to the first work on that building or improvement. In the case at bar, there is continuity in terms of the owners (all are Larry Myler entities), contractors (Ellsworth Paulsen was always there) and designer (always Ken Harris Architects) from the time that the site excavation for the main building and continuing with the later construction of the main building.

G. The Scope and Nature of the Project Did Not Materially Change Between the Commencement of Excavation in September 2004 and the Time of the Loan Closing in June 2005.

The Bank also makes the unfounded argument that there were numerous changes which were made to the Project which somehow evidence a material abandonment of the Project or a change in its continuity or common purpose. Once again, the best evidence comes from the Bank documents. The Bank persistently described the project in the same fashion. The Project was described to be a mixed use project consisting of two buildings - the Icon Building and the Main Building which had three wings (or towers) over underground parking with retail space on the ground floors, office space on the second floors and 243 residential condominiums on the upper floors. The Bank did not change its descriptions of the Project throughout its marketing of the project to its participant banks.

The Bank and the Developer consistently marketed the Project as the same project during all pertinent times.[163] The Project has always been described as a Main Building with three wings (or towers) over underground parking with retail space on the ground floors, office space on the second floors and 243 residential condominiums on the upper floors. The foot print of the Main Building did not change. In fact, over 50% of the condos had been pre-sold and over 50% of the retail space had been pre-leased before the time of the alleged "material abandonment."

As further evidence of the fact that the Project was the same project is the fact that the plans incorporated into the Ellsworth Paulsen contract dated May 5, 2004 were the same plans incorporated into the Ellsworth Paulsen/Bud Bailey

---

[163] The Bank refers on several occasions to the "change in the elimination of another tower." The Bank misleads the Court by stating that the tower was eliminated "between September 2004 and October 2005." The Bank knows full well that a fourth tower was never even considered to be a realistic part of the Project. The Developer testified in his deposition, in response to questioning by the Bank, that the fourth tower was never more than a hope and a dream that would only come into play if the initial Project was successful. *Larry Myler Depo.*, 78:8-21[R.5507 A, Exhibit "4"]. The Developer did not own the land on which the fourth tower was even contemplated. The fourth tower was never part of the commitment letters from the Bank to the Developer. The fourth tower was never part of the loan marketing packages created by the Bank. The fourth tower was not part of the Ellsworth Paulsen contract, was not part of the Ellsworth Paulsen/Bud Bailey contract nor part of the Ellsworth Paulsen /Big-D contract. The fourth tower was not part of the design plans (except as shown as a potential phase 2 of the project). No one, from the Developer, the lender, the contractors or the designers considered a forth tower as other than a long term whim.

contract dated April 25, 2005.[164] Furthermore, the same plans were incorporated into the Ellsworth Paulsen/Big-D contract that was entered into after the loan closing on August 23, 2005.[165]

The Bank also claims there was a change in the square footage of the project by 125,000[166] square feet. That is completely false. The foot print of the Project was never changed. The Project, at all relevant times, included 243 condos. The Bank is incorrectly comparing the square footage with and without including the square footage of the decks. The size differential results from the Bank incorrectly including the square footage for the exterior decks.[167]

The Bank also claims that the plans were not completed.[168] This undisputed fact does not create a genuine issue. Like all projects, there were

---

[164] Deposition Exhibit 19; *Allen Washburn Depo.*, 94 [R.5507 A, Exhibit "7"].
[165] Deposition Exhibit 21; *Allen Washburn Depo.*, 94 [R.5507 A, Exhibit "7"].
[166] The Bank cited testimony from Allen Washburn who said he needed to review the documents to verify the quantities. *See Allen Washburn Depo.*, 47:22 to 48:9 [R.5507 A, Exhibit "7"].
[167] Deposition Exhibit 155; *Larry Myler Depo.*, 35 [R.5507 A, Exhibit "4"]; Deposition Exhibits 180,181; *Jim Krumm Depo.*, 23, 27[R.5507 A, Exhibit "3"].
[168] Another "red herring" is the alleged change to the chiller plant. The creation of the central plant was done long before the ground breaking in September 2004. That change was on the drawings as of January 7, 2004. The basis of BankFirst's incorrect timing stems from its reliance on the timing of Reynolds' bid for the excavation of the central plant. That bid came later in the project. The excavation for the central plant, which Myler testified was not on the critical path, occurred later in time. *See Larry Myler Depo.*, 133:10 to 134:14 [R.5507 A, Exhibit "4"]. The reduction in the size of the underground central plant by 2800 sq. ft. occurred on as a value engineering suggestion by Ellsworth Paulsen/Bud Bailey during the relevant time frame. The 10% reduction in the size of the

some portions of the plans of the Project that had not yet been finalized. This was to be a fast-track project that would allow plans to be completed ahead of the construction process. No person has ever testified that the lack of details kept the project from moving forward or being constructed or that the lack of completion of the plans caused the Project to be materially abandoned. To the contrary, the un-rebutted testimony is that once construction resumed the designers kept working on details to support the continued construction.[169]

Compelling evidence that the uncompleted plans were not a cause of material abandonment is found in the Bank's own inspector. In its first report to the Bank dated August 18, 2005, the report stated on page 21: "It is our opinion that generally the drawings and specifications received were satisfactory, subject to clarifications of items noted above."

Further, during this entire time of alleged changes and material abandonment, the Bank was giving the same plans to interested potential participating banks to review as part of their efforts to get them to subscribe to the loan package.[170]

Attached hereto as *First Addendum to this Brief* a copy of the architectural rendering of the Project and a photograph of the model created by the Developer

---

structure housing the underground heating plant can in no way be construed as an indication of abandonment of the project.

[169] Affidavit of Brett Harris, ¶ 4 [R.5337-5507, Exhibit "G"].

[170] Deposition Exhibit 188; *Jim Krumm Depo.*, 54 [R.5507 A, Exhibit "3"].

of the Project. The Court will readily observe that the Project from beginning to the end is substantially the same with no variations of a material nature that would lead to the conclusion that the Project was materially abandoned.

None of the changes claimed by the Bank are material facts in dispute. As stated above, the Bank is in no position to claim there were material changes to the Project when they described the Project the same way. To point out the errors in the Bank's statement of the facts in its brief relative to the changes the following information is included. Many of the changes pointed out by the Bank in its Brief were made either before or after the applicable time frame. Of the changes discussed by the Bank, the following changes occurred before the ground breaking in September 2004:

> (a) The changes that were made to the stairways and elevator accesses had been resolved long before the groundbreaking. They were all reflected in the drawings dated January 7, 2004;[171]
>
> (b) The number of stories in the building were resolved years before the groundbreaking. The number of stories had been determined back in 2002. The final number of stories was reflected in all of the BankFirst marketing materials. The number of stories were reflected in the drawings dated January 7, 2004. The number of floors were shown in the renderings of 2002. The number of floors were reflected in the model constructed by the Developer and used by the real estate agents in marketing the Project.[172]
>
> (c) The storm-water detention pond, was moved to the second level of South Tower parking structure a parking area and park eliminated from the site plan. These items were determined before

[171] Affidavit of Brett Harris, ¶ 4 [R.5337-5507, Exhibit "G"].
[172] Affidavit of Brett Harris, ¶¶ 5-8 [R.5337-5507, Exhibit "G"].

the Bank became involved. The drawings with these items removed were reflected in the drawings dated January 7, 2004.[173]

Of the changes discussed by the Bank, the following changes occurred after the closing of the loan in June 2005:

(a) The atriums were always part of the Project. There were ongoing discussions whether or not to put a roof over the atriums. The decision to put roofs over the atriums was made after the loan closed and work had resumed. Whether or not the atriums were open or had roofs over them is not a material change to the project that would constitute "material abandonment" of the Project;[174]

(b) A level of exterior parking on the West Tower was moved under the structure long after the loan closed. The parking garage details for the West Tower (the last tower planned to be constructed) had not yet been finalized before the loan closed. Those details were resolved long after the loan closed while the construction was underway in the south and north wings. Of course this was a design change only since the West Wing was never constructed;[175]

(c) There were minor changes in the layout of the building. The layout changes were to move a small amount of space at the end of hallways into condos to increase the square footage of 16 of the 243 condos. These changes were made after the loan closed;[176]

(d) The type of roof shingles was upgraded long after the loan closed as the work got closer to needing to make a final decision on the type of shingles to be used. The same thing was done in upgrading the windows from vinyl to wood. That upgrade was made long after the loan closed and while work was proceeding. BankFirst cannot in good faith claim that such upgrades constitute a material abandonment of the Project;[177]

---

[173] Affidavit of Brett Harris, ¶ 4 [R.5337-5507, Exhibit "G"].
[174] Affidavit of Brett Harris, ¶ 9 [R.5337-5507, Exhibit "G"].
[175] Affidavit of Brett Harris, ¶¶ 10-13 [R.5337-5507, Exhibit "G"].
[176] Affidavit of Brett Harris, ¶¶ 14-15 [R.5337-5507, Exhibit "G"].
[177] Affidavit of Brett Harris, ¶¶16-17 [R.5337-5507, Exhibit "G"].

(e) The field changes to the roof design discussed by BankFirst were not really changes but more properly providing the necessary details needed in making connections between the various roofing members to maintain the roof line as designed. Such is common practice in construction. The design drawings do not provide all of the construction details needed to make all such connections. Those details are worked out during the construction process between the designers and the various trades;[178]

(f) The location of the future Hale Theatre was changed long after the loan closed.[179]

There is no evidence that any design change that may have been made between the excavation work and the loan closing in June 2005 had any delaying impact on the closing of the construction loan. The Bank cites no evidence to support that contention. The undisputed fact is that the delay in closing the loan was entirely related to marketing the loan to potential participant banks. After the loan was subscribed to by sufficient participant banks the loan was closed.

The argument regarding changes is wholly without merit as Claimants' discussion evidences and the witnesses Claimants have cited confirm.

H. The Project Proceeded with Reasonable Promptness Despite Financing Delays.

It is undisputed that the Bank and the Developer proceeded with reasonable promptness to get the financing of the Project funded. Krumm testified there was no guarantee how fast the financing would be completed. As

[178] Affidavit of Brett Harris, ¶¶ 18-19 [R.5337-5507, Exhibit "G"].
[179] Affidavit of Brett Harris, ¶ 20 [R.5337-5507, Exhibit "G"].

Claimants have indicated, the ultimate timing of the completion of the financing was driven by the needs of the participant lenders to have a stronger guarantor and a stronger contractor – which the Developer obtained and the Bank approved. The primary activity in the early part of 2005 was the Bank obtaining sufficient participating banks to close the loan. After the stronger guarantor was provided (Jerry Moyes) and the supervisory contractor of Bud Bailey Construction was added to the team the Bank sold out the balance of the loan to its participant banks.

The Bank cites no testimony or credible evidence that the Project did not proceed with reasonable promptness under the circumstances of this deal. This was a large and complicated deal. The Developer testified that it took 7-8 months to do this complex financial deal.[180] Mr. Krumm testified that it actually took longer:

> Q. When you were dealing with Larry Myler in this August-September time frame, did you have discussions on how long you thought it would take to put together financing for the Midtown Village project?
>
> A. Yes.
>
> Q. Tell me what was discussed in those conversations.
>
> A. Just that it all depended on how long it would take to syndicate it or participate the loan. It was open-ended. Whenever it got done, it got done. Best efforts on the sales part to get it participated.

---

[180] *Larry Myler Depo.*, 62:11-22 [R.5507 A, Exhibit "4"].

Q. It's difficult to project how long it's actually going to take?

A. Yes.

Q. It was a complicated deal?

A. Yes.

Q. I think Larry Myler reported in one of the newspaper articles it was a complicated deal. It took seven or eight months to negotiate and get it done. Would you disagree with that statement?

A. No. Other than -- well, exception. I think it was longer than seven or eight months from when we first met in -- I'll have to look at my affidavit.[181]

Delays in obtaining financing, particularly for a large complex project, are not uncommon. The period of five months from the cessation of excavation in January 2005 to the closing of the loan in June 2005, however, do not support a finding of "material abandonment" as held by the court in *Ketchem, Konkel.*[182] One of the projects in the case cited had a few month's delay after the excavation of the basement while another project had a fifteen month cessation in a nursing home construction project due to financing problems. No material abandonment was found in those cases and the Bank has not provided evidence to support its position that "material abandonment" occurred on the Midtown Project between January 2005 and June of 2005.

---

[181] *Jim Krumm Depo.*, 34:21 to 35:11; 135:11-20 [R.5507 A, Exhibit "3"].
[182] *Ketchum Konkel, Barret, Nickel & Austin v. Heritage Mountain Dev. Co.,* 784 P.2d 1217, 1220 (Utah App. 1989).

I. There was No Material Abandonment of the Project by Others Interested in the Project.

The Bank incorrectly states that "the lien claimants themselves had notice, actual or constructive, that Midtown Village had been abandoned." There is absolutely no support for that statement and the Bank cites none. The Claimants that were involved prior to the loan closing were being told by the Developer that the financing was imminent and work would be resuming soon.[183] Claimants were continuing to work with the Developer during the down time to resolve design and construction issues including Ken Harris Architects, Ellsworth Paulsen, Western States Mechanical, Tri-Phase Electric, Clayco, and others.[184]

The Developer and Jim Krumm testified that they did not believe that Orem City ever abandoned their efforts related to providing some financing for the project.[185] For the five month period where there was a cessation of physical work at the site before the loan closed, (although not in the design rooms, board rooms, or city hall rooms) Orem City worked on and ultimately concluded the issuance of bond financing for the underground parking.[186] Moreover, the Bank and Krumm specifically knew that the Developer was continuing to sell condos while the Bank was working on financing package.

---

[183] *Eddie Ballard Depo.*, 32:5-19 [R.5507 A, Exhibit "1"].
[184] *Id.*
[185] *Larry Myler Depo.*, 116:13-24 [R.5507 A, Exhibit "4"]; *Jim Krumm Depo.*, 114:4-7 [R.5507 A, Exhibit "3"].
[186] *Jim Krumm Depo.*, 49:5 to 54:1; 119:8-11 [R.5507 A, Exhibit "3"].

During the time period in question, it is not disputed that the real estate agents kept in contact with those who had purchased units by, among other ways, sending out newsletters dated October 1, 2004 and April 15, 2005 updating them on the status of the project.[187] The Developer never told the existing buyers that the Project is abandoned.[188] Western States Mechanical and Tri-Phase Electric were subcontractors who were hired in the fall of 2004 to help design the mechanical and electrical systems for the Project.[189] Eddie Ballard, President of Western States Mechanical, testified that during the four months from when the pit was dug to when the trust deed was recorded, he met frequently at the site with Tri-Phase Electric, the architect, his subcontractor engineers, the owner and the general contractor to work on the design of the mechanical and electrical systems.[190] The testimony of this work in the winter and spring of 2005, flies in the teeth of the Bank's contention that all work ceased on the Project.

There is no evidence that any of the parties involved on the Project (developer, lead lender, subscribed participant lenders, designers, contractors, Orem City, real estate agents, buyers of units) abandoned it. In light of the overwhelming testimony (not legal conclusions) of the designers, the contractors,

---

[187] Deposition Exhibits 96,154,158; *Brett Harris Depo.*, 155 [R.5507 A, Exhibit "2"]; *Larry Myler Depo.* 31,42; 123:25 to 124:23 [R.5507 A, Exhibit "4"].
[188] *Larry Myler Depo.,* 119:15 to 120:10 [R.5507 A, Exhibit "4"].
[189] *Eddie Ballard Depo.*, 12:17 to 13:1;17:9-19;18:9-16 [R.5507 A, Exhibit "1"].
[190] *Eddie Ballard Depo.*, 15:12-18 [R.5507 A, Exhibit "1"].

the owner, the lender, the City personnel, and the realtors that efforts never ceased from the ground breaking until the money dried up after two-thirds of the project was constructed, the court should have no hesitation in finding that no genuine issue exists such as would preclude this Court from affirming the decision of the District Court.[191]

VIII. THE DISTRICT COURT CONSIDERED TITLE INSURANCE SOLELY FOR THE PURPOSE OF SHOWING NOTICE OF COMMENCEMENT TO THE BANK.

In announcing its oral decision to grant the Motion for Partial Summary Judgment, the District Court specifically stated that it had "considered the existence of title insurance only for the purpose of showing notice; having nothing to do with negligence; having never looked at any policies or commitments."[192] Continuing further, the District Court stated that it had "considered title insurance only to show that the underwriter had gone out and looked at the [P]roperty and talked to the [B]ank about it and had some concerns."[193]

---

[191] It could be noted that a prime example of a project which has been abandoned would be the Sugarhouse Hole project. That is an example of a project pit which was excavated, filled in, and years have gone by. If a developer now wanted to come back with a new and different project for construction on the site, this would be an entirely new project. Such is not the case in this Project.

[192] *See* Transcript, at p. 64 [R.8538]; Order [R.7845-47] attached hereto as *Third Addendum to the Brief*.

[193] *See Id.*, at p. 64 [R.8538]; Order [R.7845-47] attached hereto as *Third Addendum to the Brief*.

Appellate courts reverse trial court decisions to admit or exclude evidence only if the trial court's ruling was "beyond the limits of reasonability."[194] Consequently trial courts have broad discretion with respect to evidentiary decisions and will disturb its ruling only for abuse of discretion. In the instant case, the District Court's consideration of the existence of title insurance solely for the purpose of showing notice of commencement of excavation is not beyond the limits of reasonability and certainly not an abuse of its discretion.

Rule 411 expressly extends only to liability insurance to prove negligent or wrongful conduct. Rule 411 of the Utah Rules of Evidence states:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

In the instant matter, there is no liability insurance only title insurance. Title insurance creates duties of indemnity that arises out of acts or omissions that lead to the liability of the insured. In this case the title company has furnished the Bank with a promise to defend and indemnity against mechanic's lien claims that have priority. Any references by Claimants to title insurance were done solely to demonstrate admissions against interest about the knowledge of

---

[194] *See Daines v. Vincent*, 2008 UT 51, ¶ 21, 190 P.3d 1269 (quoting *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 51, 82 P.3d 1076).

commencement of construction and the fact that the construction of the Project was one continuous operation.

Claimants did not mentioned title insurance for the purpose of showing that the Bank acted negligently or otherwise wrongfully but rather for the facts that Bank knew about and discussed problems with priority due to the commencement of construction; eventually requiring and obtaining title insurance to protect its interests in the Property.

The pertinent facts include the following:

(1) First American Title Company asked the title company handling the closing, Equity Title, to complete a Mechanics Lien Risk Analysis form in which the representative, who had seen the large hole in the ground, completed the Mechanics Lien Risk Analysis form by stating that "excavation had begun"[195]; and

(2) BankFirst's Vice President, Jim Krumm, had visited the site and seen the large excavated hole where the south tower was to be built. Because of BankFirst's concern about the priority of liens for excavation it required the title company to make sure that those that performed the excavation work were paid off at the time of the closing.[196] The Bank documents confirm that the title company agreed to provide title insurance.

It would be reading Rule 411 too broadly to hold that when a person has observed something and recorded it in a document that just because that person works for a title company it renders it inadmissible. In this case a title insurance person witnessed the massive hole and wrote about that hole in a document.

---

[195] Deposition Exhibit 165; *Adella Pearson Depo.*, 33 [R.5507 A, Exhibit "5"].
[196] Deposition Exhibit 190; *Jim Krumm* Depo., 102 [R.5507 A, Exhibit "3"].

That document is proof of their observation and does not fall within the ambit of Rule 411.

The District Court did not abuse its discretion and considered nothing that was irrelevant or inadmissible when it considered the existence of title insurance solely for the purpose of showing notice of the commencement of excavation.

IX. APPELLEES ARE ENTITLED TO THEIR ATTORNEY FEES AND COSTS ON APPEAL.

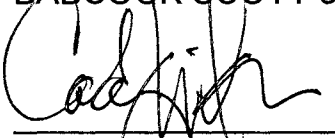
Appellees are entitled to their attorney fees and costs on appeal because their action arises from Utah Code § 38-1-1 *et al.*, which provides for an award of attorney fees and costs. Appellees explicitly request their attorney fees for this appeal. "A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award." Utah R. App. P. 24(a)(9). Accordingly, Appellees are entitled to their attorney fees and costs incurred on appeal.

CONCLUSION

For all of the foregoing reasons, the Claimants respectfully request that this Court affirm the District Court's granting of partial summary judgment in favor of the Claimants.

RESPECTFULLY SUBMITTED this 23rd day of March, 2011.

BABCOCK SCOTT & BABCOCK PC



ROBERT F. BABCOCK
KENT B. SCOTT
CODY W. WILSON*
Attorneys for Appellees

**As directed by the Clerk of the Court, counsel has contacted counsel for each respective Appellee and all join in this brief.*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2011, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

Mark L. Poulsen – mlpoulsen@nsdplaw.com
NELSON SNUFFER DAHLE & POULSEN

Paul J. Walstad – pjwalstad@walstadlaw.com
Stephen O. Taylor – sotaylor@walstadlaw.com
WALSTAD LAW GROUP, LLC

Michael J. Kelly – mkelley@joneswaldo.com
Mark D. Tolman – mtolman@joneswaldo.com
JONES WALDO HOLBROOK & McDONOUGH, PC

Andrew Wadsworth – amwadsworth@gmail.com
Bruce Shapiro – bshapiro@shapiropclaw.com
WADSWORTH & WADSWORTH, PC

David R. Nielsen – david@osnlaw.com
Conrad H. Johansen – conrad@osnlaw.com
Kevin M. Bischoff – kevin@osnlaw.com
OLSEN SKOUBYE & NEILSON, LLC

Richard A. Rappaport – rick@crslaw.com
Leslie Van Frank – leslie@crslaw.com
COHNE RAPPAPORT & SEGAL, PC

Ronald G. Russell – rrussell@parrbrown.com
Stephen E.W. Hale – shale@parrbrown.com
Matthew J. Ball – mball@parrbrown.com
Jenifer L. Tomchak – jlt@pwlaw.com
PARR BROWN GEE & LOVELESS, PC

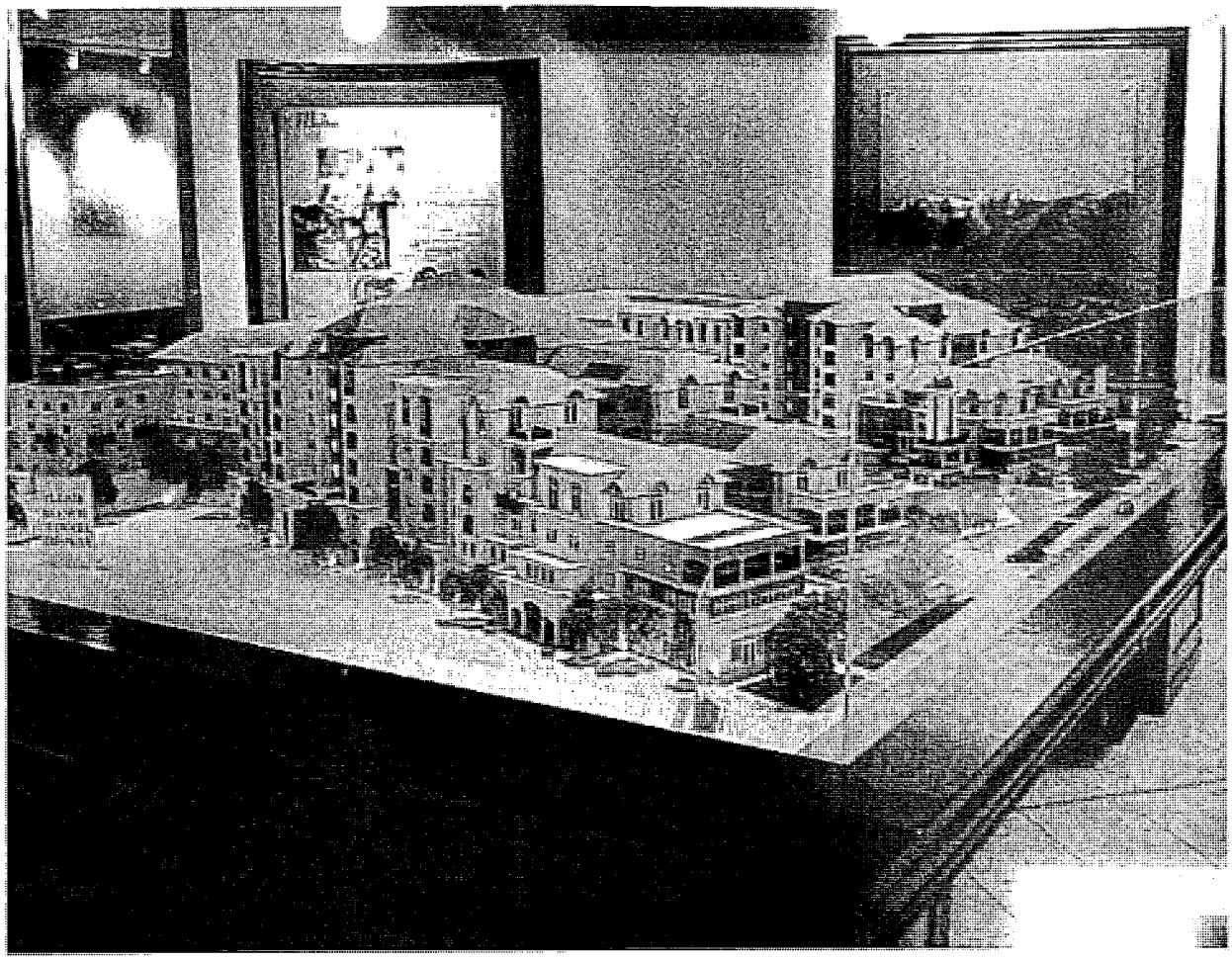
Darrel J. Bostwick – darrel@bostwickprice.com
Joseph D. McAllister – joseph@bostwickprice.com
BOSTWICK & PRICE, PC

Mark E. Wilkey – markw@smesteel.com
SME STEEL CONTRACTORS, INC.

Darwin H. Bingham - dbingham@scalleyreading.net
SCALLEY READING BATES HANSEN & RASMUSSEN, PC

BY: 

FIRST ADDENDUM TO THE BRIEF



SECOND ADDENDUM TO THE BRIEF

Robert F. Babcock (USB No. 0158)
Kent B. Scott (USB No. 2897)
Cody W. Wilson (USB No. 9839)
BABCOCK SCOTT & BABCOCK PC
Washington Federal Plaza
505 East 200 South, Suite 300
Salt Lake City, Utah 84102
Telephone: (801) 531-7000
Facsimile: (801) 531-7060

Attorneys for Several Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

TIM RISINGER dba MARATHON TRIADS CARPET MILL OUTLET, *et al.*

Plaintiffs,

v.

MIDTOWN JOINT VENTURE, LC, *et al.*

Defendants.

CORRECTED
~~[PROPOSED]~~ ORDER

Consolidated Case No. 080401531

Judge Samuel D. McVey

On April 23, 2010, the Court held a hearing for the parties to present oral arguments regarding Plaintiff Lien Claimant's Motion for Partial Summary Judgment filed on April 9, 2009.

Robert F. Babcock and **Cody W. Wilson** were in attendance representing Plaintiffs Big-D Construction Corp., Big-D Construction Corp./Ellsworth Paulsen Construction Co. – JV, Tim Risinger dba Marathon Triads Carpet Mill Outlet, BMC West Corporation, T.S. Electric, Inc., Geneva Rock Products, Inc., Aspen View Construction, LLC, Valley View Building Services, Inc., Carey W. Olsen, Spectrum Engineers, Inc., Wasatch Ornamental Iron, Ken Harris Architect, R. P. Painting & Decorating, Inc., Ellsworth Paulsen Construction, Inc., and Federal Insurance Company;

Paul Walstad was in attendance representing Plaintiff Clayco, Inc.;

Mark L. Poulsen was in attendance representing Plaintiffs Western States Mechanical, Inc., JPM, Inc. & Houghton Plaster, Inc., M.C. Green & Sons, Inc.;

David R. Nielson was in attendance representing Plaintiffs Robert I. Merrill Co., Owell Precast, LLC, B&B Specialties, Inc.;

Richard A. Rappaport was in attendance representing Plaintiff Reynolds Brothers, Inc.;

Chris Hill was in attendance representing Plaintiff Quality Assurance Engineering;

Mark D. Tolman was in attendance representing Plaintiff *Sierra Pacific Industries;*

Mark E. Wilkey was in attendance representing Plaintiff SME Steel Fabricators, Inc.;

Joseph D. McAllister was in attendance representing Plaintiff Firetrol Protection Systems, Inc.;

Andrew Wadsworth and **Bruce Shapiro** were in attendance representing Midtown Joint Venture, LLC;

Jared L. Anderson was in attendance representing Larry Myler; and

Ronald G. Russell, Stephen E.W. Hale, Matthew J. Ball and **Jenifer Tomchak** were in attendance representing Defendants FDIC; Coralee Ellis; James A. Ellis; Edna H. Leavitt; The Leila Welling Horne Family Trust; and Phyllis Wilson.

The Court having reviewed the pleadings on file, having heard oral arguments from the parties, reviewed all the evidence submitted and for good cause appearing, now finds as follows:

ORDER

The Court ORDERS, ADJUDGES and DECREES as follows:

Plaintiffs Motion for Partial Summary Judgment is granted. Pursuant to Utah Code Annotated § 38-1-5 valid mechanics' liens on the Midtown property have priority over the trust

deeds of BankFirst, since owned by FDIC and now owned by United Western Bank, because visible construction work on the Main Building of the Midtown Village Project ("Project") commenced prior to the recording of the BankFirst trust deeds and the undisputed facts support the conclusion that the Project was not materially abandoned from the time the excavation work commenced in the fall of 2004 to the time the first loan closed in June 2005.

UNDISPUTED FACTS

1. Excavation work was performed at the property located at 320 South State Street in Orem, Utah commonly referred to as Midtown Village (the "Project") beginning in September 2004 through early 2005. *Larry Myler Deposition*, P. 31, ¶17-23 and P.32, ¶6-12; P.41, ¶8 to P.43, ¶18; P.114, ¶5-13; *Brett Harris Deposition*, P.110, ¶14-17; PP.115-120; *Gary Reynolds Deposition*, P.58 to P.60, ¶17-20; Deposition Exhibits 96, 154 & 158.

2. The dimension of the excavation work performed in late 2004 was approximately 400' in length, 150' in width and 22' in depth. *Larry Myler Deposition*, P. 31, ¶17-23 and P.32, ¶6-12; Deposition Exhibit 154.

3. The excavated hole was for the mat footing and underground parking structure for the south wing of the Main Building. *Allen Washburn Deposition*, P.118, ¶25 to P.120, ¶14; *Larry Myler Deposition*, P. 31, ¶17-23; P. 202, ¶14-18; *Brett Harris Deposition*, P.98, ¶9 to P.100, ¶11; Deposition Exhibit 20.

4. A second hole for the north wing of the Main Building was also excavated in late 2004 and early 2005. *Larry Myler Deposition*, P.41, ¶8 to P.43, ¶18; *Gary Reynolds Deposition*, P.60, ¶17-20; P.65, ¶16-24; P.113, ¶1-21; P.138, ¶18 to P.141, ¶3 (*as corrected*); Deposition Exhibits 96, 158.

5. The walls of the excavation identified above were stabilized with gunite and soil nails. *Tod Wadsworth Deposition*, P.50, ¶6 to P.51, ¶12; Deposition Exhibits 24, 129, 162, 190.

6. The excavation work was readily visible to anyone that visited the Project site. *Jim Krumm Deposition*, P.96, ¶2 to P.99, ¶11; *Larry Myler Deposition*, P. 31, ¶17-23 and P.32, ¶6-12; P.43, ¶9-18; P. 61, ¶ 6-25; P.114, ¶5-13; *Adella Pearson Deposition*, P.50, ¶21-25; P.58, ¶25 to P.61, ¶21; Deposition Exhibits 96, 165.

7. The excavation for the mat footing and the underground parking became part of the overall work of improvement for the Main Building of the Project. *Larry Myler Deposition*, P.202, ¶14-18.

8. The construction deed of trust of BankFirst to secure a loan in the amount of $42 million ("BankFirst Loan") was recorded on June 17, 2005 ("BankFirst Deed of Trust"). Deposition Exhibit 161.

9. Before the loan closed both a representative of BankFirst and a representative of Equity Title Company, who was handling the loan closing, actually observed the excavation work identified above. *Jim Krumm Deposition*, P.96, ¶2 to P.99, ¶11; *Larry Myler Deposition*, P.60, ¶16 to P.61, ¶25; *Adella Pearson Deposition*, P.50, ¶21 to P.52, ¶4; P.58, ¶25 to P.59, ¶9; P.61, ¶5-20; Deposition Exhibit 165.

10. Prior to the loan closing, on June 15, 2005, the representative of Equity Title Company completed a Mechanics Lien Risk Analysis form indicating that her opinion based upon her inspection of the site was that excavation work on the improvement had commenced and that lien claimants existed. *Adella Pearson Deposition*, P.50, ¶21 to P.52, ¶4; P.61, ¶5-20; Deposition Exhibit 165.

11. The funds used from the BankFirst Loan, were intended for, and were used for the building of the Main Building of the Project, including further and extensive work on the premises by Plaintiffs. *Larry Myler Deposition*, P.139, ¶5-8.

12. Mr. Larry Myler ("Mr. Myler") was the developer of the Project and was the principal contact person for each of the entities that he controlled in developing the Project including Western Oasis, Tower Development Services, Midtown LLC, and the Midtown Village Joint Venture. *Larry Myler Deposition*, P. 136, ¶2-6; P.152, ¶15 to P. 155, ¶10-13; P.116, ¶25 to P.118, ¶3.

13. Midtown Village Joint Venture was the successor of the interests of Western Oasis, Tower Development Services, and Midtown LLC, in the development of the Project. *Larry Myler Deposition*, P.116, ¶25 to P.118, ¶3; P.136, ¶2-6; P.152, ¶15 to P.155, ¶10-13.

14. BankFirst was the lender that worked with Mr. Myler from July of 2004 until BankFirst funded the $42 million loan in June of 2005. *Jim Krumm Deposition*, P.34, ¶21 to P.35, ¶11; P.44, ¶24 to ¶45; P.46, ¶3-21; P. 56, ¶24 to P.57, ¶5; P.70, ¶14 to P.71, ¶6; P.77, ¶11-22; P.78, ¶6 to P.79, ¶10; P.86, ¶5-15; Deposition Exhibits 155, 181, 184, 186, 187, 189, 193.

15. BankFirst (1) provided the Developer with a loan commitment letter for the Project in August 2004 (Deposition Exhibit 181; *Jim Krumm Deposition*, P.27); (2) required from the Developer a $15,000 good faith deposit for the Project loan in August of 2004 (Deposition Exhibit 183; *Jim Krumm Deposition*, P.39, ¶10-23); (3) helped arrange for a $562,000 loan to permit the Developer to commence excavating at the Project in September 2004 (Deposition Exhibits 153, 182; *Jim Krumm Deposition*, P.36, ¶23 to P.37, ¶18; P.65, ¶1-9; *Larry Myler Deposition*, P.26, ¶22 to P.27, ¶17); (4) developed and created its marketing package in September 2004 and began acquiring subscriptions from participant banks in October 2004 (Deposition Exhibits 184, 185, 186, 187; *Jim Krumm Deposition*, P.42, 45, 48, 51); (5) persisted in its efforts to finance the Project until it succeeded in having the loan closed in June of 2005 (Deposition Exhibits187, 188; *Jim Krumm Deposition*, P.51, 54); (6) acquired subscriptions from

participant banks in October and November of 2004 (Deposition Exhibits 184, 185, 186, 187; *Jim Krumm Deposition*, P.42, 45, 48, 51); (7) approved a stronger guarantor for the Developer to improve the marketing package in December of 2004 (Deposition Exhibit 188; *Jim Krumm Deposition*, P.54); (8) maintained existing participant banks and acquired subscriptions from additional participant banks in 2005 (one (1) in January; eight (8) in March; seven (7) in April; four (4) in May; and eight (8) in June)(Deposition Exhibits 185, 186, 187, 188; *Jim Krumm Deposition*, P.45, 48, 51, 54).

16. At all material times the architect was Ken Harris Architects. *Larry Myler Deposition*, P.17, ¶25 to P.18, ¶4; *Brett Harris Deposition*, P.15, ¶3-8; Deposition Exhibits 4, 18, 19, 155, 181, 193.

17. At all times material hereto, the Project has been a mixed use project with residential condos, professional offices, and retail spaces, in a Main Building situated in a "U" shape consisting of South, North and West wings with a central courtyard surrounding an Icon Tower. The Project was designed to have underground parking with approximately 98,000 square feet of retail on the first floors; 106,000 square feet of office space on the second floors; and 243 residential condominiums on the third through seventh floors. More than 50% of the 243 residential condos had been pre-sold and more than 50% of the retail space had been pre-leased, before and while, BankFirst was marketing the financing package to participant banks. *Larry Myler Deposition*, P.36, ¶4 to P.37, ¶10; P.39, ¶9 to P.40, ¶11; Deposition Exhibits 115, 181, 189, 193.

18. At all times material hereto, there was a common plan on the Project – the Project remained a mixed use project with essentially the same make up in the uses. *Larry Myler Deposition*, P.20, ¶2 to P.21, ¶12; P.36, ¶4 to P.37, ¶10; P.39, ¶9 to P.40, ¶11; Deposition Exhibits 115, 181, 189, 193.

19. BankFirst and its bank representative to the Project were actively engaged in efforts to finance this Project, and five (5) months after the work on the excavation stopped, the loan was committed and closed. Deposition Exhibits 161, 180, 181, 184, 185, 186, 187, 188.

20. From the loan closing on June 15, 2005, $650,000.00 from the loan proceeds was used to pay for the excavation work performed in September 2004 and early 2005 and $150,000 from the loan proceeds was used to pay for the gunite and soil nailing shoring work. "Admitted" by BankFirst in Request for Admission No. 17 in response to the Request for Admissions by Big-D, *et. al.*, dated June 16, 2009 said admission being made after a recitation of general objections to the request; Deposition Exhibit 190.

21. At the request of BankFirst for an additional guarantor, Myler made efforts to bring Mr. Jerry Moyes ("Mr. Moyes") in as an additional guarantor on the construction loan for the Project. Those efforts succeeded and Mr. Moyes became an additional guarantor on the loan to BankFirst in order for Midtown Village JV to obtain the loan from BankFirst. *Jim Krumm Deposition*, P.52, ¶21 to P.53, ¶24; *Larry Myler Deposition*, P.46, ¶3 to P.47, ¶6; Deposition Exhibit 188.

22. There were ongoing efforts by BankFirst to market and close the loan during the fall of 2004 up through and until the loan closed in June of 2005. Deposition Exhibits 161, 180, 181, 184, 185, 186, 187, 188.

23. Mr. Myler and his various entities remained involved on the Project after Mr. Moyes got involved as a guarantor for the loan. See Development Agreements attached Exhibits "B" & "C" to Plaintiff's Reply Memorandum in Support of its Motion for Partial Summary Judgment; *Larry Myler Deposition*, P.116, ¶25 to P.118, ¶3; P.136, ¶2 to P. 137, ¶6; P.152, ¶15 to P.156, ¶20.

24. Ellsworth Paulsen Construction remained involved with the Project even though it worked with two other contractors during the course of the Project: Bud Bailey Construction was a co-general contractor before the loan closed, and Big-D was the co-general contractor after the loan closed. *Larry Myler Deposition*, P.89, ¶25 to P.94, ¶17; Deposition Exhibits 18, 19, 21.

CONCLUSIONS OF LAW

I. ISSUE OF PROCEDURE.

1. Priority is an element of the Plaintiffs' case, an element that Plaintiffs must establish; therefore Plaintiffs are not prohibited from proceeding in the manner they have chosen by addressing the priority issue on the Project prior to addressing the element of lien validity.

2. The Court rejects the argument of Defendants that the Motion for Summary Judgment is premature.

II. ISSUE OF PRIORITY.

1. In accordance with Utah Code Annotated § 38-1-5 and *E.W. Allen Associates, Inc. v. FDIC*, 776 F. Supp. 1504 (1991), to determine the priority date of a mechanics' lien against another encumbrance, the Court must look to the commencement of work on the structure or improvements.

2. The substantial excavation work done in September 2004 through early 2005 was not mere site preparation work; rather it was clearly the commencement of a large construction project.

3. The substantial excavation work done in September 2004 through early 2005 constitutes constructive notice that work had commenced on the Main Building of the Project and that construction was underway.

4. The substantial excavation work done in September 2004 through early 2005 also constituted actual notice to both BankFirst and the title company that work had commenced on the Main Building of the Project and that construction was underway.

5. The excavation for the underground parking and the mat footings in September 2004 and early 2005 constituted the commencement of work on the Project pursuant to Utah Code Annotated § 38-1-5, and all valid mechanics' liens relate back to the commencement of that work in September of 2004 and have priority over any encumbrance which attached subsequent to September, 2004.

6. Pursuant to Utah Code Annotated § 38-1-5, the valid mechanics' liens for work on the Project have priority over the subsequently recorded BankFirst Deeds of Trust.

III. ISSUE OF MATERIAL ABANDONMENT.

1. In accordance with *Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Development Co.*, 784 P.2d 1217 (1989), to determine whether material abandonment has occurred, the Court must determine if a single project was constructed under a common plan and prosecuted with reasonable promptness.

2. At no time material hereto did BankFirst materially abandon the Project.

3. At no time material hereto, did Larry Myler and his entities, including Western Oasis, Tower Development Services, Midtown LLC, and the Midtown Village Joint Venture, materially abandoned the Project.

4. The Project was a single project constructed under a common plan.

5. Any design changes that occurred were never such that the changes would signal that the Project that had been conceptualized was abandoned and a new different project was being commenced.

6. The same project that was commenced with the excavation for the mat footings and the underground parking was prosecuted, under the circumstances of this Project, with reasonable promptness without material abandonment.

7. Any delay in this Project resulting from financial problems did not constitute an abandonment of the Project given the continued efforts by those involved including BankFirst to resolve those financial problems and the success of those efforts within approximately five (5) months resulted in the construction loan sold to participant banks, funded and closed.

8. No cessation of work on the Project occurred that would be sufficient to put a reasonable observer on notice that the Project had been abandoned.

9. The Project did not stop and another project was not initiated.

10. The Project was not materially abandoned from the time the excavation work commenced in the fall of 2004 to the time that the loan closed in June 2005.

DATED this 22 day of June, 2010.

FOURTH DISTRICT COURT

ORIGINAL IF IN RED INK

JUDGE SAMUEL D. McVEY

THIRD ADDENDUM TO THE BRIEF

Robert F. Babcock (USB No. 0158)
Kent B. Scott (USB No. 2897)
Cody W. Wilson (USB No. 9839)
BABCOCK SCOTT & BABCOCK PC
Washington Federal Plaza
505 East 200 South, Suite 300
Salt Lake City, Utah 84102
Telephone: (801) 531-7000
Facsimile: (801) 531-7060

Attorneys for Several Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

TIM RISINGER dba MARATHON TRIADS CARPET MILL OUTLET, *et al.*

Plaintiffs,

v.

MIDTOWN JOINT VENTURE, LC, *et al.*

Defendants.

~~[PROPOSED]~~ ORDER

Consolidated Case No. 080401531

Judge Samuel D. McVey

On April 23, 2010, the Court held a hearing for the parties to present evidence and oral arguments regarding Defendants Motion to Strike filed on July 31, 2009.

Robert F. Babcock and **Cody W. Wilson** were in attendance representing Plaintiffs Big-D Construction Corp., Big-D Construction Corp./Ellsworth Paulsen Construction Co. – JV, Tim Risinger dba Marathon Triads Carpet Mill Outlet, BMC West Corporation, T.S. Electric, Inc., Geneva Rock Products, Inc., Aspen View Construction, LLC, Valley View Building Services, Inc., Carey W. Olsen, Spectrum Engineers, Inc., Wasatch Ornamental Iron, Ken Harris Architect, R. P. Painting & Decorating, Inc., Ellsworth Paulsen Construction, Inc., and Federal Insurance Company;

Paul Walstad was in attendance representing Plaintiff Clayco, Inc.;

Mark L. Poulsen was in attendance representing Plaintiffs Western States Mechanical, Inc., JPM, Inc. & Houghton Plaster, Inc., M.C. Green & Sons, Inc.;

David R. Nielson was in attendance representing Plaintiffs Robert I. Merrill Co., Owell Precast, LLC, B&B Specialties, Inc.;

Richard A. Rappaport was in attendance representing Plaintiff Reynolds Brothers, Inc.;

Chris Hill was in attendance representing Plaintiff Quality Assurance Engineering;

Mark D. Tolman was in attendance representing Plaintiff *Sierra Pacific Industries;*

Mark E. Wilkey was in attendance representing Plaintiff SME Steel Fabricators, Inc.;

Joseph D. McAllister was in attendance representing Plaintiff Firetrol Protection Systems, Inc.;

Andrew Wadsworth and **Bruce Shapiro** were in attendance representing Midtown Joint Venture, LLC;

Jared L. Anderson was in attendance representing Larry Myler; and

Ronald G. Russell, Stephen E.W. Hale, Matthew J. Ball and **Jenifer Tomchak** were in attendance representing Defendants Bank First; Coralee Ellis; James A. Ellis; Edna H. Leavitt; The Leila Welling Horne Family Trust; and Phyllis Wilson.

The Court having reviewed the pleadings on file, having heard oral arguments from the parties, reviewed all the evidence submitted and for good cause appearing, now finds as follows:

ORDER

The Court ORDERS, ADJUDGES and DECREES as follows:

1. The Court has disregarded the facts which the Defendants moved to strike with the exception of title insurance information, which the Court considered only for the purpose of

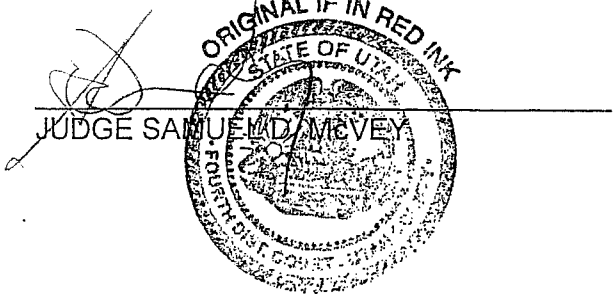
showing notice, having nothing to do with negligence, policies or commitments. The Court did not review any title insurance policies or commitments in rendering this decision.

2. The Court finds that there are sufficient undisputed facts, upon which to decide the Motion for Partial Summary Judgment filed on April 9, 2009.

3. Therefore, Defendants July 31, 2009 Motion to Strike is hereby DENIED.

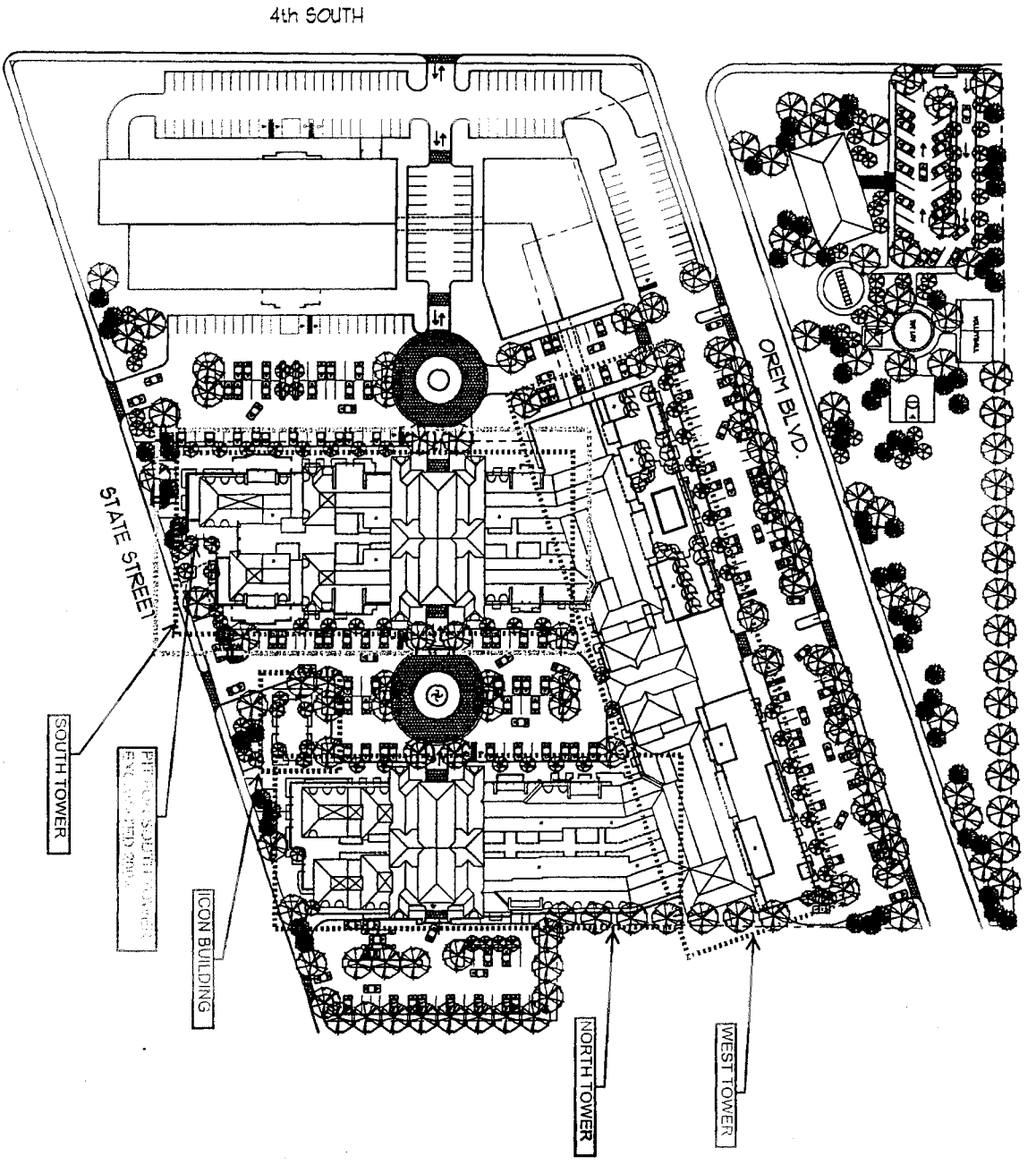
DATED this 22 day of ~~May~~ June, 2010.

FOURTH DISTRICT COURT



JUDGE SAMUEL D. McVEY

FOURTH ADDENDUM TO THE BRIEF



PLAN DATE

NORTH
SCALE 1" = 50'

E. A. Lyman
Landscape Architecture
Land Planning
Urban Design

A2

A NEW PROJECT FOR
MIDTOWN VILLAGE
LARRY MYLER — OREM, UTAH
FIRST LEVEL FLOOR PLAN

KEN GARRIS ARCHITECT

FIFTH ADDENDUM TO THE BRIEF

BANK	SUBSCRIPTION DATE
Great Basin Bank of Nevada	October 7, 2004
Rosemount National Bank	October 12, 2004
Security State Bank of Lewiston	October 12, 2004
State Central Bank	October 13, 2004
State Bank of Delano	October 15, 2004
United Southwest Bank	November 4, 2004
Northwestern Bank	November 10, 2004
SunFirst Bank	January 28, 2005
Mutual Bank	March 21, 2005
Forreston State Bank	March 21, 2005
Harwood State Bank	March 22, 2005
First State Bank	March 23, 2005
Peoples Bank of Deer Lodge	March 24, 2005
First International Bank & Trust	March 25, 2005
Nevada Bank and Trust Company	March 25, 2005
Canton State Bank	March 25, 2005
Banner Banks	April 1, 2005
First National Bank & Trust Co. of Williston	April 5, 2005
Canton State Bank	April 7, 2005
Farmers and Merchants State Bank of Pierz	April 8, 2005
Pioneer Bank	April 18, 2005
First State Bank	April 18, 2005
The Pueblo Bank and Trust Company	April 26, 2005
East Dubuque Savings Bank	May 11, 2005
Alaska Pacific Bank	May 18, 2005
American Marine Bank	May 18, 2005
The First National Bank	May 20, 2005
Capital Savings Bank	June 1, 2005
Ohio Heritage Bank	June 3, 2005
BankWest, Inc.	June 7, 2005
Savanna-Thomson State Bank	June 8, 2005
Peoples Bank of Wisconsin	June 8, 2005
Stratford State Bank	June 13, 2005
Community Bank of Oelwein	June 14, 2005
Bankfirst	June 17, 2005

SIXTH ADDENDUM TO THE BRIEF

DEVELOPER AND OTHERS ACTIVITIES

Late 2002 Developer begins to develop and plan for the Project

September 2002 The architect begins design for the Project

May 5, 2004 Ellsworth Paulsen enters contract with Developer to build Project

September 4, 2004 Excavation begins for the South Tower of the Main Building for the Project

Between September 4, 2004 and January 2005 Contractors perform $800,00+ in excavation, guniteing and soil nailing work for the 400'x150'x22' pit

October 13, 2004 Ellsworth Paulsen recorded a Notice of Commencment for the Project with the Utah County Recorder

October 2004 the Developer has sold 50% of the Condos and leased 50% of the Retail space on the Project

January 6, 2005 – June 15, 2005 Developer, architect, & contractors working on electrial and mechanical design, architectural revisions, holding weekly Project construction meetings with Developer and contractors

February 1, 2005 Wadsworth Brothers recorded a mechanic's lien against the property for the gunite and soil nails it provided to stablize the excavated pit on the Project

Spring 2005 Orem City working on the issuance of Special Improvement District bonds for the Project

Spring 2005 At the request of the Bank Ellsworth Paulsen added partner to build Project – joint venture formed with Bud Bailey Construction.

Spring 2005 At the request of the Bank for a stronger guarantor, Jerry Moyes brought into the Project as an additional guarantor

April 2005 The Developer and the Project real estate broker issued a newsletter to current buyers of condo units confirming that the Project was very much alive and the parties are there every day

June 15, 2005 Equity Title prepares a Mechanics Lien Risk Analysis stating "work of improvement had commenced" … "excavation has begun".

June 17, 2005 At the loan closing Developer pays backthe $562,000 loaned to start Project excavation

June 17, 2005 At the loan closing Developer pays Contractors $1 million in construction and design work done between September 2004 and Janary 2005 – work which was included on the schedule of values of the Bank

August 23, 2005 Ellsworth Paulsen enters into joint venture with Big-D Construction for construction of the Project in replacing of Bud Bailey Construction as joint venture partner

October 11, 2005 Ellsworth Paulsen/Big-D JV start pouring foundations in the South Tower pit and continue with the excavation for North Tower and central plant

February 8, 2008 Work suspended on the Project due to lack of payment

BANK ACTIVITIES

June 14, 2004 Developer makes good faith deposit to Bank for $15,000 to work on the loan package

July 28, 2004 Bank issues proposed financing terms for the Project to Developer

August 18, 2004 Bank issues terms and conditions for loan to Developer

September 1, 2004 Bank facilitates $562,000 loan to Developer to commence excavation for the Project

October 2004 Project soliciation package sent out by Bank to consortium of banks to subscribe for loan participation for the Project

Between October 2004 and June 2005 the Bank obtains subscriptions from participant banks

October 2004 five banks subscribe to the Project loan

November 2004 two banks subscribe to the Project loan

January 2005 one bank subscribes to the Project loan

March 2005 Bank sends out a revised Project Soliciation to consortium of banks to subscribe for loan participation for the Project

March 2005 eight banks subscribe to the Project loan

Spring 2005 Bank representative makes Project site visit with potential participant banks and observes the massive excavation for South tower

April 2005 seven banks subscribe to the Project loan

May 2005 four banks subscribe to the Project loan

June 2005 eight banks subscribe to the Project loan

June 17, 2005 Bank records Construction Deed of Trust in the amount of $42,000,000.00

June 20, 2005 Bank provides final confirmations to all participating banks which subscribes between October 2004 and June 2005

Between June 2005 and July 2007 Bank funds construction draws on the Project

April 10, 2007 records Construction Deed of Trust in the amount of $62,000,000.00

Between August 2007 and November 2007 Bank funds construction draws on the Project